

Dawn raids and the right to privacy

A comparative study of how the European Convention of Human Rights, the European Union and Finland protect companies' right to privacy in unannounced competition authority inspections

Suokko Elisa Katariina

013031312

Helsingin yliopisto

Oikeustieteellinen tiedekunta

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Summary

This thesis is a comparative study of how the European Convention of Human Rights, the European Union and Finland protect companies' right to privacy in unannounced competition authority inspections. More precisely, it aims to establish the current scope of companies' right to privacy under Article 8 of the European Convention of Human Rights and to assess if the European Union and Finland meet this standard. The key points of interests are the definition of the right from the perspective of companies, the limitations it sets to competition authorities, and the safeguards required to ensure that the right to privacy is respected.

Article 8 of the European Convention of Human Rights is drafted to protect natural and legal persons from arbitrary actions of public authorities. This protection takes various forms. Pursuant to the wording of the article, the right to respect to private and family life, home and correspondence is protected. The article employs concepts that at the level of everyday language seem best suited for natural persons. During the past three decades, the European Court of Human Rights has interpreted the article as granting protection also to legal persons, companies included. The concept of home has been extended to business premises and the concept of correspondence to confidential communications between a lawyer and a company client. However, the Court has reserved contracting states a wider margin of appreciation regarding the rights of legal persons.

This interpretation of Article 8 of the European Convention of Human Rights entails that unannounced competition authority inspections interfere, by their nature, with companies right to respect to home and, depending of the materials under inspection, also with the right to respect to correspondence. An interference does not amount to a violation of the article, but it triggers a number of safeguards to ensure that the interference is necessary and proportionate. The European Court of Human Rights has established in its case-law that all interferences with rights protected under Article 8 should be subject to prior judicial authorization or a posteriori judicial review. Other safeguards depend on the individual circumstances of each case, but judicial review has been established as an absolute requirement. This means that in competition authority inspections, both the inspection decision and the authority measures during an inspection should be subjected to judicial review.

In Finland, this is not the case. Competition Act sets out a prohibition against appeal of the inspection decision. The inspection decision and the measures taken during an inspection may be appealed only if the Finnish Competition and Consumer Authority makes a proposition of a penalty payment to the Market Court. This entails that all interferences with companies' right to privacy under Article 8 of the European Convention of Human Rights are not subject to judicial review. As a contracting party to the Convention, Finland is under the obligation to comply with relevant interpretations of the Court. The requirement of judicial review appears to be one. The Finnish Government is preparing a reform of the Competition Act, whereby this question could be addressed as a part of the reform. The Report of the Working Group of the reform, which is addressed in this thesis, does not propose any improvements in this regard.

The European Union, for its part, is not bound by the Convention. Nevertheless, the Convention still plays an important role in the European Union and it does contribute to the fundamental rights protection of companies in the European Union. This is the case particularly with Article 8 of the European Convention of Human Rights, as the fundamental right to privacy provided by Article 7 of the Charter of Fundamental Rights of the European Union should correspond to that provided by the Convention. In practice, the question is more complex. Companies may subject the inspection decisions of European Commission to judicial review but the possibility to appeal inspection measures is more limited. Thereby, the European Union does not either meet the standard set out by the Article 8 of the Convention.

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1. Introduction

The three things I have enjoyed the most in my legal studies are comparative law, the term “dawn raid” and human rights. The first is an excellent tool to understand what laws really are about, the second makes office work sound exiting and the third reminds that law is a question of values and constant boundary-drawing. The Finnish Government kindly decided to initiate a competition law reform, which enables me to combine these three in my Master’s thesis.

As a part of the competition law reform, the inspection rights of the Finnish Competition Authority (“FCCA”) are subjected to review. This is a field where different legal spheres meet. National law, European Union law (“EU law”) and the European Convention of Human Rights (“ECHR”) all provide regulations that must be complied with. These regulations are complimentary, in constant interaction and sometimes also conflicting. The aim of this thesis is to analyse this field from the perspective of companies right to privacy as provided by Article 8 ECHR. The question that my work aims to answer is what is the right to privacy of a company under unannounced competition authority inspection – a so-called dawn raid – and how this right is respected in the EU and in Finland.

To find the answer, following sub-questions need to be answered. What is the relationship between the ECHR, EU law and Finnish national legislation in this regard? What is the content of the right to privacy pursuant to Article 8 ECHR for companies under inspections? How is this right interpreted in the EU and in Finland, and what similar rights are protected under the instruments of the EU or national instruments? Finally, what are the safeguards required by the ECHR to respect the right to privacy and how do the safeguards provided in the EU and Finland correspond to these?

At this point, it must be clear that the concept of human rights in the opening phrase is not used in the traditional meaning. This thesis does not address the rights of natural persons but those of legal persons, and more precisely, the rights of undertakings. It is well-established by the European Court of Human Rights (“ECtHR”) that undertakings also enjoy protection of their rights. These rights are not a question of life and death as it may be with rights of natural persons but more a matter of stability and predictability in the relationship between states and companies. There are still voices that criticise the application of human rights to companies. This is a conversation my thesis will not participate in. In order to save space to answer my research question, I will take the applicability of some human rights to companies

as a taken. As this reading is good enough for the ECtHR, it is good enough for my work, too.

To be able to answer my research question in satisfactory detail, I focus exclusively on unannounced inspections taking place at business premises. The choice of unannounced inspections is based on the role of consent: the consent of the holder of the right may play a role when establishing an interference with a right. The chosen limitation means that certain investigative powers of competition authorities, including requests for information, will not be addressed. Thereby, I focus in depth only in those cases where the company is subjected to an authority inspection without their consent, meaning that non-compliance may lead to sanctions or use of coercive measures. Furthermore, competition authority inspections may be carried out also in residential premises. In those cases, the right under interference is also the right of the natural person whose home is being inspected. In home inspections, the rights of companies and natural persons interlink. Thereby, inspections in domestic premises will be excluded, save a few necessary exceptions of recent case-law.

Another limitation is set by the nature of the European Court of Human Rights (“ECtHR”). The ECtHR does not provide detailed guidelines on how to carry out an authority inspection that respects the human rights of companies. The ECtHR assesses the lawfulness and proportionality of authority measures case by case. Thereby, some interpretations made by the ECtHR are very case-sensitive, and cannot be used as a measuring stick to assess situations in other contracting states. Only certain interpretations developed by the ECtHR are applicable to all contracting states. This entails that my study focuses on those aspects of competition authority inspections where the ECtHR has established requirements that apply in all situations. Upon studying the case-law of the ECtHR, I understood that majority of those rules concern judicial supervision of authority measures. Thereby, that is at the core of this thesis. The central safeguards required by the ECtHR are legal basis of the measure and judicial review of the conformity of the measures taken on the basis of the law. These have become minimum requirements for coercive authority measures. More particular safeguards, such as the contents of the inspection decisions or concrete timeframe of the inspection, are more case-sensitive and the case-law does not provide answers that could be generalized.

The EU and individual states, like Finland, have a different approach than the ECtHR. They regulate all aspects of competition law infringements and their investigation. This means

that the EU and Finland provide detailed legislation on the definition of an infringement, the investigation procedure and court proceedings – the EU more detailed than Finland. Both aspire to have rules that enable the effective enforcement of competition goals, whilst respecting the rights of companies under inspections. However, EU and Finland do not necessarily grant human rights similar absolute value as the ECtHR does.

The key provisions of ECHR for companies under competition authority inspections are Articles 6 ECHR and 8 ECHR¹, which provide the right to a fair trial and, as stated above, the right to respect for privacy or as provided in the Convention text, the right to respect for family and private life, for home and for correspondence. The two articles have certain similarities and the rights protected are linked, to a certain extent. The right to respect for correspondence which is provided under Article 8 ECHR and which covers correspondence with a lawyer is linked to the rights of defence, which are protected under Article 6 ECHR. Article 8 ECHR also sets out a requirement of judicial authorization or *a posteriori* judicial review, which resembles the right to access to a court provided in Article 6 ECHR. These similarities cause sometimes confusion², and the safeguards to ensure compliance with Article 8 ECHR may be mixed with rights of defence. Those are, however, two separate questions. As an example, rights of defence do not necessarily come to play if the inspection does not lead to a finding of an infringement of competition rules and a sanction. The rights protected under Article 8 ECHR have, anyhow, been interfered with even in that case and the necessity and proportionality of that interference should be assessed.

Upon my study, I noticed that the literature on Article 8 ECHR and companies under authority inspections or searches is rather scarce. Either the focus is on Article 6 ECHR rights or the focus is on individuals and their right to privacy. Thereby, as a part of my thesis, I wanted to explain to myself and the potential readers, what is the content of that right for companies and what are its implications. As will be explained in the following chapters, the right to privacy as defined by Article 8 ECHR is a broad concept. For a company, in this context, it mainly means the right to decide who enters their premises and reads their documentation. This right is limited by the interest to prevent and punish competition infringements.

¹ Pellonpää 2008, p. 32.

² For example Berghe and Dawes 2009, p. 421 discusses rights of defence under Article 6(1) ECHR but quotes interpretation made regarding Article 8 ECHR.

In a sense, granting authorities access to company files to investigate potential abuses does not sound like an outrageous human rights violation. It is a fact that some undertakings resort to anticompetitive practices when they carry out their businesses, and this causes harm to their competitors, their customers and economic activity in general. Competition authorities, for their part, aim to ensure that these practices are ended and the undertakings punished accordingly. However, authorities are human and humans make mistakes. Authorities may, with the best intention to ensure the enforcement of competition law, extend their mandate. The European Commission (“Commission”) carried out a fishing expedition at the premises of German railway company Deutsche Bahn to seek evidence of a number of suspected competition infringements. This is not to suggest that authorities in general have an interest to do so, but in those situations where mistakes happen, there should be a mechanism to identify and rectify them. The rationale of the right to privacy is to ensure that authorities do not obtain excessive powers. This applies to authorities in all fields, not just competition authorities. The right to privacy provides a perspective for the society: individuals and companies have their spheres of privacy, where the state may not enter without a justified reason. This is not to encourage the diminishing of the role of the state but to ensure lawfulness of its actions.

In my thesis research, I studied the ECtHR cases where Article 8 ECHR had been applied in authority inspections or comparable searches with the view to identify rules that may be generalized and, on the contrary, that are exclusively case-sensitive or relevant only under certain circumstances. This part of the research was carried out in the online database of the ECtHR. The search function of the database enables search by article. I went through the judgments where Article 8 ECHR has been applied between 2007–2017 and studied the ones where Article 8 ECHR was applied in the context of an authority inspection or search and where the applicant was either a company or an individual whose business premises were searched due to a suspected infringement carried out as a part of their business activities. As for older cases, I studied the landmark cases.

As for the part of the EU, I studied case-law on competition authority inspections to understand how the CJEU has interpreted and applied Article 8 ECHR, the corresponding Article 7 of the European Charter of Fundamental Rights (“CFR”), and the general principle that provides a somewhat equivalent protection. I identified these cases in the database of the CJEU by using following search words: “Article 8 of the European” AND “competition”; “right to privacy” AND “competition”; “right to respect for” AND “competition”; “Article

7 of the Charter” AND “competition”. Where the search brought up the Opinion of the Advocate General, I also looked into the judgement to which it was related to. I read in more detail the cases that concerned competition authority inspections.

In Finland, the case-law on the topic is far more limited, as Article 8 ECHR has been raised only in one case. Section 10 of the Finnish Constitution (“FC”), for its part, only protects natural persons. In this field, my main attempt is to analyse, if and how the right provided by Article 8 ECHR is – or could – be protected in Finland. To see how the right to privacy or related rights has been addressed in cases concerning suspected competition infringement as well as to study if the applicants have claimed irregularities in the inspection decision or procedure at the trial concerning penalty payment, I studied the judgements of the Finnish Market Court and Supreme Administrative Court that were issued on the basis of a proposition for a penalty payment issued by the FCCA. To identify the cases, I used the case register on the website of the FCCA, which provides a list of cases between 2003–2017. Some of the judgements were available at the FCCA website, the rest I searched for on the website of the Market Court, Finlex.fi and Edilex.fi.

For explanations, analysis and context, I carried out a literary review of relevant research literature. As may be concluded from the above, the research method is legal dogmatics. The aim of this method is, according to the often-quoted book of Ari Hirvonen, to interpret and systematise legal norms, with the aim to establish the content of norms in force through analysis of laws and interpretations thereof³³. This is where my thesis operates: I try and identify the level and means of protection required by the ECHR and to see how the EU and Finland reach this. Obviously, also the relationship between the EU and Finnish law is relevant. As a part of this research, I do comparisons between different legal spheres. I operate at the practical level, whereby the comparison is only a means of systematization. Comparative law within the meaning of theoretical research is left for others. As regards any *de lege ferenda* suggestions, I stay with the propositions put forward by the ECtHR.

The recently published doctoral dissertation of Helene Andersson on dawn raids touches upon many of the same questions as my thesis. Andersson’s research investigates how Commission inspections respect the fundamental rights provided in the CFR and in the ECHR. This means that she addresses a number of rights, one of them being the right to privacy as provided in Article 8 ECHR, including the protection of legal communication,

³³ Hirvonen 2011, 21–26.

and Article 7 CFR. However, this is just one of the aspects of her study. Her findings have provided valuable insights, but I also have reached some slightly different conclusions. I also focus in depth in Article 8 ECHR, with the aim to highlight its scope and content as well as the differences between that and Article 6 ECHR or other ECHR rights. Andersson, at times, is less strict in this regard. I also have carried out a review of cases until mid-July 2017, whereby I have some more recent materials and am able to address more recent potential developments than Andersson. Moreover, my thesis aims to carry out a comparison between the ECHR, EU law and national law, which adds an additional layer to the research. To conclude: I am not the first one to write on this topic but my work does have an independent contribution. You find it below.

2. Question of competences: relationship between ECHR, EU and Finland in competition matters and related human rights

2.1 Courts, councils and committees: mixed framework of human rights protection

2.1.1 Introduction

This chapter will provide an introduction into the relationships between the ECHR, EU law and national legislation. It sets out the international legal framework for human rights protection, which the right to privacy of companies under competition inspections is a part of. This chapter explains the role of the ECHR and more importantly, the role of the judgements of the ECtHR, at national level and EU level. As the latter, in particular, is an issue too complex to be analysed in depth in this limited space, only the legal framework will be set out. I will start with the general role of the ECHR, then elaborate on the role it plays in Finnish legislation, after which I will move to the more complex relationship between the ECHR and the EU. To conclude, the general role of EU law and EU fundamental rights in the context of Finnish competition regulation is addressed, in the very limited scope that is necessary for the main topic of this work.

2.1.2 ECHR and Finland: Convention and contracting state

The ECHR is an international human rights treaty that entered into force in 1953⁴ and that currently has 47 contracting states⁵. By ratification, the contracting states take to respecting and protecting the rights enshrined in the ECHR⁶. The rights, for their part, are not exhausted

⁴ The Council of Europe: Complete list of the Council of Europe's treaties.

⁵ The Council of Europe: Chart of signatures and ratifications of Treaty 005. Convention for the Protection of Human Rights and Fundamental Freedoms.

⁶ Article 1 of the ECHR.

in the Convention text, as it is a living instrument. The content of the rights protected is interpreted and thereby further defined by the ECtHR⁷. The most important judgements are those delivered by the Grand Chamber, but also other judgements produce valid interpretations⁸. The ECtHR has established that its interpretation of the Convention is evolutive, which means that the provisions are interpreted in the light of the present-day conditions.⁹ Furthermore, the ECtHR interprets the Convention in a dynamic way, to ensure that the essential object and purpose of the article in question are fulfilled¹⁰. This entails that the rights protected in 2017 are not the same as the rights in 1953. The compliance with individual provisions is assessed in cases taken in front of the ECtHR, but the states also have the general duty to “monitor the conformity of their legislation and administrative practice with the requirements of the Convention and the Court's case law”, as formulated in the Explanatory Report of Protocol 14¹¹. This means that interpretations developed in individual cases have an impact on all contracting states¹². Thereby, upon drafting new legislation, the contracting states are under the duty to take into account the developments of the case-law of the ECtHR and possible novel interpretations.

Finland ratified the ECHR in 1990. The Convention was incorporated in the Finnish legislation by an ordinary parliamentary law.¹³ This means that in the Finnish hierarchy of norms, it has the value of an ordinary law and not a superior status¹⁴ – which is the case with all human rights treaties¹⁵. However, the Constitutional Law Committee (“CLC”) clarified that irrespective of the status of the national law incorporating the Convention, Finland as a state operator is bound by its provisions at all times¹⁶. The Finnish Constitution (“FC”),

⁷ The jurisdiction of the ECtHR is established in Article 32 ECHR.

⁸ Cameron 2009, p. 70.

⁹ *Société Colas Est and others v. France*, Application no. 37971/97, 16 April 2002, para 41 and *Cossey v. the United Kingdom*, Application no. 10843/84, 27 September 1990, para 35; Ervo 2009, p. 244–245. On principles of interpretation of the ECtHR, see Dothan 2014.

¹⁰ *Niemietz v. Germany*, Application no. 13710/88, 16 December 1992, para 31.

¹¹ See also Viljanen 2007, p.304–305.

¹² Cameron 2009, p. 70.

¹³ Laki 438/1990 ihmisoikeuksien ja perusvapauksien suojaamiseksi tehdyn yleissopimuksen ja siihen liittyvien lisäpöytäkirjojen eräiden määräysten hyväksymisestä (“The law on the incorporation of the Convention for the Protection of Human Rights and Fundamental Freedoms and certain regulations of Protocols thereof”) and asetus 439/1990 ihmisoikeuksien ja perusvapauksien suojaamiseksi tehdyn yleissopimuksen ja siihen liittyvien lisäpöytäkirjojen voimaansaattamisesta sekä yleissopimuksen ja lisäpöytäkirjojen eräiden määräysten hyväksymisestä annetun lain voimaantulosta (“Regulation of the entry into force of Law 438/1990”). See Pellonpää 2005, p.60.

¹⁴ PeVL 2/1990 p. 2.

¹⁵ Scheinin 2002, p.32.

¹⁶ PeVL 2/1990, p.2. See also Pellonpää 2005, p. 60.

which came into force ten years after the Convention was introduced in Finnish legislation, provides in Section 22 that public authorities have the obligation to ensure the observance of human rights. This elevated the obligation to comply with human rights instruments at the level of the constitution. Moreover, the CF confers the CLC the obligation to issue statements on the relationship between legislative proposals and international human rights treaties¹⁷. This means that the conformity of legislation with the ECHR is, or should be, assessed at the legislative phase.

To conclude, the ECHR sets out the obligation for the contracting states to observe both the compliance with the Convention text and the interpretations of the ECtHR when introducing new legislation and applying existing laws. A corresponding obligation is included in Finnish legislation by the incorporation of the Convention text as well as the obligations set out in the Constitution. The framework of legislation is clear, but in practice, the situation is more complex. The CLC does not always address the ECHR – not to mention the up-to-date interpretations thereof – and when it comes to right to privacy, the Committee has the tendency to focus on the constitutional right to private life set out in Section 10 FC, which, irrespective of certain similarities, is not a corresponding right, as will be established later in this work.

2.1.3 ECHR and EU: inspiration without submission

The European Union, for its part, is supposed to become a contracting party to the ECHR pursuant to Article 6(2) of the Treaty on the European Union (“TEU”)¹⁸. The article was introduced by Lisbon Treaty in 2009 but in 2014, the accession process was brought to a halt by the Court of Justice of the European Union (“CJEU”)¹⁹. In Opinion 2/13²⁰, the CJEU identified several problem issues in the accession, most notably the binding force of the judgements of the ECtHR and their impact on interpretation of EU law, which is and should remain in the exclusive competence of the CJEU²¹. As of now, the ECtHR does not have formal jurisdiction over the acts of EU institutions²², but the ECHR still has a special role²³

¹⁷ Section 74 of the Finnish Constitution. See also Viljanen 2001, p. 267.

¹⁸ All current Member States of the EU are also contracting parties to the ECHR.

¹⁹ On the accession process, see for example Raba 2015 and Andreadakis 2015.

²⁰ Opinion 2/13 of the Court of 18 December 2014 on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.

²¹ Opinion 2/13, para 184. See also Raba 2015, p. 30–32

²² This was explicitly stated by the ECtHR in *Matthews v. United Kingdom*, Application no. 24833/94, 18 February 1999; see Pellonpää 2007, p. 352.

²³ C-112/00 *Eugen Schmidberger v. Austria*, EU:C:2003:333, para 71. See also Andreadakis 2015, p. 48.

in EU law. The EU has established its own system of fundamental rights protection, which the ECHR and judgements of the ECtHR are a part of²⁴. In the EU, human rights or fundamental rights, as they are addressed within the EU jurisdiction²⁵, are protected through the Charter of Fundamental Rights of the European Union (“CFR”), and through general principles of law. The ECHR has had a great influence in both of them.

Fundamental rights were initially introduced in EU law as general principles of law. These principles are developed by the CJEU and have the status of primary law in the hierarchy of norms²⁶. Fundamental rights were introduced as a general principle common to constitutions of Member States²⁷ and later, also as recognised in international human rights treaties²⁸ and more precisely, the ECHR, once all Member States had ratified the Convention in 1974²⁹. With Maastricht Treaty, the respect for fundamental rights as guaranteed by the ECHR was enshrined at Treaty level³⁰.

The CFR, which became a primary source of law with the Lisbon Treaty³¹, contains many of the rights provided in the ECHR³². Pursuant to Article 52(3) CFR, where the rights are corresponding, the ECHR sets out the minimum level³³. Furthermore, Preamble 5 CFR states, by wording, that the CFR reaffirms the rights as they result from the case-law of the ECtHR, among other sources. Furthermore, Article 6(3) TEU ensures that fundamental rights as guaranteed by the ECHR and resulting from the constitutional traditions common to the Member States constitute general principles of EU law. Once the CFR became a primary source of law, the CJEU has been in the favour of applying the CFR rather than referring to the rights protected under the ECHR³⁴. Still the CJEU sometimes refers to the ECHR, which has happened also in cases concerning competition inspections³⁵. It may be concluded that the relevance of ECHR varies case by case. This kind of plurality of sources

²⁴ See, for example, *Raba* 2015, p. 22–23.

²⁵ On the terminology, see Rosas and Armati 2010, p. 147.

²⁶ On the role of general principles of law as a source of EU law, see for example Hartley 2014, p. 144.

²⁷ Case C-29/69, *Stauder*, EU:C:1969:57, para 8.

²⁸ Case C-4/73, *Nold*, EU:C:1974:51, page 507; Hartley 2014, p. 144–149.

²⁹ Pellonpää 2008, p.21–22. The first reference to the ECHR was made in 1975 in the case *Rutili*, which concerned the freedom of movement.

³⁰ Article F Maastricht Treaty.

³¹ Article 6(1) TEU.

³² For exhaustive presentation of corresponding articles, see Explanations relating to the Charter of Fundamental Rights of the European Union (2007/C 303/02).

³³ Explanations relating to the Charter of Fundamental Rights of the European Union (2007/C 303/02), p.17.

³⁴ De Búrca 2013, p. 169; Polakiewicz 2015, p. xxii.

³⁵ See, for example, C-583/13, *Deutsche Bahn v. Commission*, EU:C:2015:404

has been described as a characteristic of EU fundamental rights protection. The Treaties provide the CJEU the possibility to apply many sources side by side – or case by case.³⁶

The ECHR and the judgements of the ECtHR have a formal role in EU law, but the CJEU does not appear to be bound by the interpretations put forward by the ECtHR. Weiss has proposed that “the incorporation” of the ECHR provisions in the CFR would have led to also the incorporation of relevant case-law³⁷, but that has not been the case. The authoritative interpretation is still carried out by the CJEU. As majority of human rights are not absolute, the actual content of the right is defined through legitimate limitations to that right³⁸. The legitimacy of the limitation, for its part, is established by the court carrying out the assessment. In doing so, the interpreting court has the power to define, among other things, the required safeguards. The EU treaties and the CJEU acknowledge the importance of the ECHR rights, but they are applied – and more importantly, restricted³⁹ – in the special context of EU law⁴⁰. This means that the scope of protection and the safeguards required may be different in the EU than pursuant to the interpretation of the ECtHR, even if the EU refers to the ECHR.

This is also a major difference between individual Member States and the EU: Member States cannot reinterpret the interpretations of the ECtHR, but the EU, to a certain extent, retains the possibility. This, for its part, may have implications to Member States, who are simultaneously bound by the ECHR and the EU law. The Member States, all of which are contracting states to the ECHR, may be held responsible for breaches of the ECHR even when they are carried out applying EU legislation⁴¹.

2.1.4 Competition law in Finland: applicability of Charter and beyond

The FCCA inspections are governed both by EU law and national law. Pursuant to Article 3 Treaty on the Functioning of the European Union (“TFEU”), the EU has exclusive competence in establishing the competition rules necessary for the functioning of the internal

³⁶ Hofmann and Mihaescu 2013, p. 77–83.

³⁷ Weiss 2011, p. 190.

³⁸ Jääskinen 2015, p. 19.

³⁹ Pursuant to Article 52(1) CFR, the rights enshrined may be limited only if it is necessary and genuinely meet *objectives of general interest recognised by the Union* or the need to protect the rights and freedoms of others.

⁴⁰ This has been formulated by the CJEU in case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para 4 and reaffirmed in Opinion 2/13, para 170. See also Weiss 2015, p. 83–88; Meehan 2000, p. 94.

⁴¹ Pellonpää 2007, p. 352; Husa 2001, 49–50.

market⁴². For material competition rules, this means that national authorities must apply Articles 101 and 102 TFEU in parallel with national provisions where the suspected infringement has an impact on the internal market⁴³. Where the impact is fully internal, Member States may have in force also national provisions. In Finland, the content of national provisions prohibiting anti-competitive practices corresponds to Articles 101 and 102 TFEU.

The procedural rules, for their part, are subject to national legislation⁴⁴. This includes also provisions on inspections. National rules become applicable even where the suspected infringement has an impact on the internal market of the EU. The principle of national procedural autonomy⁴⁵ provides that each Member State may carry out the proceedings of national competition authorities and courts pursuant to their national legislation⁴⁶. Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty⁴⁷ (“Regulation 1/2003”) provides few very limited requirements that have an impact on national procedure⁴⁸. For the rest, procedural rules are subject to national legislation. In Finland, Regulation 1/2003 has led to an indirect harmonization of inspection rights. Article 21 of the Regulation, which provides the Commission the power to inspect other premises than business premises in Member States lead to the adoption of same powers for the FCCA⁴⁹.

However, the national procedure must ensure the effectiveness and equivalence of EU law, which entails that national legislation and practice must enable the effective enforcement of EU law and that the enforcement of EU law must be equally efficient as that of national legislation⁵⁰. In the field of competition law, this means that national law must ensure the full effectiveness of EU competition law⁵¹, as well as the uniform application thereof⁵². This

⁴² Article 3 TFEU. On the conferral of competence to the EU, see for example Salminen 2009.

⁴³ Article 3 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁴⁴ Berghe and Dawes 2009, p. 410.

⁴⁵ Established by the CJEU in C-33/76, *Rewe-Zentralfinanz*, EU:C:1976:188, para. 5.

⁴⁶ Established by the CJEU in C-60/92, *Otto BV v Postbank NV*, EU:C:1993:876, para 14, and C-242/95, *GT Link A/S v De Danske Statsbaner*, EU:C:1997:376, paras 24–26; Rizzutto 2011, p. 569, Völcker 2014, p.1515

⁴⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁴⁸ Regulation 1/2003, preamble 21, Article 2; Rizzutto 2011, p. 569.

⁴⁹ HE 88/2010, Hallituksen esitys Eduskunnalle kilpailulaiksi. p. 77.

⁵⁰ Joined cases C-430/93 and C-431/93 *Van Schijndel and van Veen*, EU:C:1995:441, para 17; C-129/00 *Commission v Italy*, EU:C:2003:656, para 25; joined cases C-295/04 to C-298/04 *Manfredi and Others*, EU:C:2006:461, paras 62 and 71; joined cases C-222/05 to C-225/05 *van der Weerd and Others*, EU:C:2007:318, para 28, and C-268/06 *Impact*, EU:C:2008:223, paras 44 to 46; Rizzutto 2011, p. 569.

⁵¹ C-557/12, *Kone AG v. ÖBB-Infrastruktur AG*, EU:C:2014:1317, para. 32.

⁵² Van Gleyenbreugel 2011, p. 523.

puts forward both a positive and a negative requirement. National law must provide provisions to enable the effective enforcement of EU competition law and these provisions must be effectively implemented⁵³. It also sets out a prohibition of national procedural rules that make the enforcement more difficult and less effective⁵⁴. This applies in particular to judicial proceeding where the decisions of competition authorities are challenged.⁵⁵ As for now, this has not been a question in Finland, as the effectiveness of the procedure has not been challenged. Furthermore, Finnish legislation provides national competition authorities, for the part of inspection rights, corresponding competences to those the Commission enjoys under the Regulation 1/2003.

Another way EU law may impact competition proceedings is through the CFR. Where the authorities apply EU law, also fundamental rights protection is triggered. The Member States must comply with the CFR when applying or implementing EU law⁵⁶. The applicability of CFR is strictly limited to that context. This entails that upon the application of EU competition rules, the authorities are bound by the right to privacy as set out in Article 7 CFR, which corresponds to Article 8 ECHR. This will be addressed in further detail later.

The Proposal for a Directive to empower the competition authorities of the Member States⁵⁷ is set out to govern situations where national authorities apply Article 101 and 102 alone or in parallel with national legislation⁵⁸. The Proposal will be addressed in detail in Chapter 2.2.2. The justification for the chosen approach in the Proposal is that different competences in enforcement of national competition law and EU law do, pursuant to the Commission, “hamper the effectiveness of the enforcement of competition law in the internal market”⁵⁹. This entails that also the provisions of national law must be enforced in compliance with the directive in those cases, where Articles 101 or 102 TFEU are applicable.

⁵³ C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerders (VEBIC) VZW*, EU:C:2010:739, para 56.

⁵⁴ Established by the CJEU in C-106/77, *Simmenthal*, EU:C:1978:49, paras 20–22.

⁵⁵ *Ibid*, para 57.

⁵⁶ These rules were initially formulated regarding human rights as general principles of EU law in C-260/89, *ERT*, EU:C:1991:254, para 42 and in C-5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, EU:C:1989:321, para 19; Hartley 2014, p. 149–150.

⁵⁷ Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market on 22 March 2017 COM(2017) 142 final.

⁵⁸ Proposal, Article 1.

⁵⁹ Proposal, Preamble 4.

The CJEU formulated in *Åkerberg Fransson* that where the national provisions implement EU law, the CFR provides minimum level of protection at national level⁶⁰. Pursuant to the judgement, not only provisions transposing directives trigger CFR but also national legislation implementing obligation imposed upon a Member State by the Treaty⁶¹. Thereby, if the proposed directive comes into force in the suggested form, it is possible that the CFR would set the minimum level also to national enforcement procedures where Articles 101 or 102 are applied. This is stipulated also by Article 3 of the Proposal, pursuant to which where the national authorities exercise powers referred to in the Directive, they must be subject to appropriate safeguards “in accordance with general principles of Union law and the Charter of Fundamental Rights of the European Union”. The Preamble refers only to situations of exercise of *conferred* powers.

2.2 Competition authority inspections

2.2.1 Regulatory framework

The right to privacy is a beautiful swamp and thereby, an accurate map is necessary. As the topic is the right to privacy in unannounced competition authority inspections, I will start by the description of these inspections and the competences of European and Finnish authorities. After this, it is possible to understand how the inspections interfere with the right to privacy and, on the contrary, what kind of aspects of the inspections are – or should be – limited by the right. This could also be labelled as the boring part, as it contains long explanations of what the competition authorities are entitled to inspect and where. However, this information is relevant to understand the interference with the right to privacy these inspections may constitute. Also the decisions taken and their appealability is important later, as is the legal basis of the inspection rights. These questions will be addressed in Chapters 3 and 4, which may be called the fun part.

The EU law and Finnish competition law provide competition authorities the right to carry out unannounced inspections at company premises where they suspect breaches of competition rules. The Commission has the competence to carry out inspections where it suspects a breach of EU competition law and the FCCA is competent to carry out inspections to investigate both breaches of EU law and national competition law. The ECHR does not, obviously, have provisions governing specially competition law inspections. Through the

⁶⁰ C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105, paras 19–21 and 29; Bernitz 2015, p. 199.

⁶¹ *Ibid*, para 28.

interpretation of Article 8 ECHR, the ECtHR has provided general limitations to authority inspections and searches and seizures. In this chapter, I will provide a definition of inspection powers of competition authorities in the EU and Finland.

2.2.2 Reform of Competition Act

As mentioned above, the subject of this thesis was inspired by the reform of the Finnish Competition Act 948/2011 initiated by the Ministry of Economic Affairs and Employment (“MEAE”). As a part of this process, also the provisions regarding the inspection rights of the Finnish Competition and Consumer Authority (“FCCA”) will be reviewed. At the moment of writing this thesis, the reform is still mid-way. The reform will be taken part gradually: the Governmental Proposal on the first set of reforms is expected by the end of the year and the MEAE presumes to make further changes once the Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market is issued⁶². A ministry-appointed Working Group on the Reform of the Competition Act⁶³ (“Working Group”) published its final report on 14 March 2017⁶⁴ (“Working Group Report”) with propositions for future provisions. The changes suggested by the Working Group may be rejected, integrated partially or fully. This thesis work will reflect on the propositions put forward by the Working Group.

One of the central questions addressed in the report is the right to respect for privacy as prescribed by Article 8 ECHR. This was a task explicitly assigned to the Working Group by the MEAE. The MEAE expressed in its decision establishing the Working Group that the prohibition to appeal the FCCA inspection decisions should, potentially, be reviewed in the light of Article 8 ECHR. The decision also states that the functioning and the effectiveness of the inspections should be assessed from the perspective of the rights of companies.⁶⁵

The Working Group proposed changes to several provisions of the Competition Act, of which I will address only the ones related to the inspection procedure. Firstly, it proposes that inspections may be continued at the premises of the FCCA or other authority in the

⁶² Email response of Virve Haapajärvi, negotiating officer of MEAE, 8 September 2017.

⁶³ In Finnish “Kilpailulain uudistamista koskeva työryhmä”. The working group consisted of representatives of the MEAE, the FCCA, the Market Court, the Supreme Administrative Court, the Finnish Bar Association and relevant industry organizations.

⁶⁴ Kilpailulain uudistamista koskevan työryhmän mietintö 16.3.2017 (“The report of the Working Group on the reform of the Competition Act”)

⁶⁵ Työ- ja elinkeinoministeriö: Päätös 25.8.2015 Kilpailulain uudistamista koskevan työryhmän asettaminen. (“The decision of the Ministry of Economic Affairs and Employment of 25 August 2015. The establishment of Working Group on the reform of the Competition Act”)

presence of a representative of the company. Secondly, also phones, tablets and other portable mobile devices may be subjected to inspection. This is formulated in the report by addressing the inspection as “device-neutral”. Thirdly, the right to ask for explanations would be extended also to inspections of domestic premises of company staff. Fourthly, the Working Group proposes that information exchange between national and Nordic authorities should be improved, meaning that the exchange of confidential information would be made easier between national authorities and enabled between Nordic competition authorities, who are parties to the Agreement between Denmark, Iceland, Norway and Sweden concerning cooperation in matters of competition^{66, 67}.

On the contrary, the Working Group proposes that the current prohibition to appeal the FCCA inspection decisions would be maintained. Similarly, the assessment of documents allegedly containing privileged communication between an external lawyer and the client company would be carried out in an internal procedure of the FCCA, a procedure which the FCCA already follows. This procedure would be enshrined in the reformed Competition Act.⁶⁸

The propositions put forward by the Working Group are in line with the recommendations of the European Competition Network (“ECN”). The ECN recommends that national legislation provides the possibility to continue inspections at authority premises⁶⁹, that the authorities have the right to inspect all devices and all data formats and that the authorities have the right to ask for explanations at all inspected premises⁷⁰.

These recommendations may be elevated also at the level of a directive. The Commission issued the Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market on 22 March 2017 (“Proposal”). The Proposal contains provisions on various aspects of competition authority competences, including financing, inspection powers and fining powers. For the part of inspection rights, the Proposal obliges the Member States to enable continued inspection at authority premises⁷¹ and to enable the inspection of all data,

⁶⁶ Nordic co-operation would require Finland to become a party to the Agreement.

⁶⁷ Working Group Report, p. 15–16.

⁶⁸ *Ibid*, p. 15–16.

⁶⁹ ECN recommendation on the power to collect digital evidence 18 November 2013, para 8.

⁷⁰ ECN Recommendation on powers to investigate enforcement measures 9 December 2013, paras 21c, 21d, and 21e.

⁷¹ Proposal for a Directive of the European Parliament and the Council to empower the competition authorities, Preamble 24 and Article 6(1)(c).

irrespective of the form it is stored in⁷². As for the right to ask explanations on other premises, the Proposal does not set out a requirement to enable this. The Proposal only sets out the requirement for the Member States to enable the competition authorities to ask explanations in inspections of business premises. In other premises, this is optional.⁷³ Where the proposed directive would enter into force in its current form, Finnish legislation should provide the right to continue inspections at authority premises and the right to inspect all mobile devices.

2.2.3 Commission: investigator, prosecutor and decision-maker

In the EU, the authority competent to enforce competition rules is the Commission. The inspection powers of the Commission have their basis in the prohibitions against anti-competitive practices set out in Article 101 and 102 TFEU. Article 101 TFEU prohibits anti-competitive agreements and the abuse of dominant position is prohibited under Article 102 TFEU. The aim of these articles is to ensure the competitiveness of the markets, increase consumer welfare and, to a certain extent, contribute to the functioning of the internal market of the European Union⁷⁴. The powers to enforce Articles 101 and 102 TFEU are provided in Article 105 and Article 103. Article 105 TFEU provides that the Commission is the competent body to investigate suspected infringement of Articles 101 and 102 TFEU⁷⁵. Article 103 TFEU provides the competence to introduce secondary legislation to enable the enforcement of the prohibitions⁷⁶. The inspection procedure is regulated under Regulation 1/2003⁷⁷, which grants the Commission the powers of inspection under Article 20 and 21 as well as the right to fine companies infringing articles 101 and 102 TFEU⁷⁸.

The inspection procedure is regulated under Regulation 1/2003. The Commission may carry out informal inspections with the permission of the company in question⁷⁹ but majority of inspections are based on Commission authorizations, which require the consent of the

⁷² *Ibid*, Preambles 4 and 21.

⁷³ *Ibid*, Article 6(1)(e) and Article 7(3)

⁷⁴ Vestager 2017, speech delivered 10 May 2017; Vestager 2016, speech delivered 1 December 2016; C-286/13, *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, para 121; C-501/06, *GlaxoSmithKline Services v Commission*, EU:C:2009:610, para 63; on the historical development, see Jones and Sufrin 2011, p. 42–54.

⁷⁵ On the interpretation of the article, see for example Tosato and Bellodi 2006, p. 10; Papadopoulos 2010 p. 167.

⁷⁶ On the interpretation of the article, see for example Tosato and Bellodi 2006, p. 12. On general presentation of the hierarchy of norms within the European Union, see for example Tosato and Bellodi 2006, 1–8.

⁷⁷ Chapter V (Articles 17–22) Regulation 1/2003.

⁷⁸ See, for example, Jones and Suffrin 2011, p. 1043.

⁷⁹ Tosato and Bellodi 2006, p. 114.

company or decisions, which enable the Commission to operate also in the absence of the permission of the company. Article 20 of the Regulation authorizes the Commission to inspect business premises and Article 21 authorizes the inspection of other relevant premises, such as home premises of directors, managers and other members of staff. Inspections are not limited to companies suspected of competition infringements, but the Commission may also inspect the business premises of third parties.⁸⁰ Thereby, the Commission inspections may take place in business premises and, in certain cases, on domestic premises. The Commission principally carries out the inspections at the company premises and only in exceptional situations does it continue the inspection at its own premises⁸¹.

The inspections are authorized by an inspection decision taken by the Commission under Articles 20(4) or 21(1) and (2). Pursuant to the articles, the decision sets out the subject matter, purpose and scope of the inspection. The inspection decision is subject to appeal in the General Court. The Commission may not use force, whereby upon resistance, it must ask the Member State authorities for assistance⁸².

Pursuant to Articles 20 and 21 of the Regulation, during an inspection, the inspecting officials and other authorized persons may enter any premises, land and vehicles of undertakings and associations of undertakings or, upon reasonable suspicion, any other premises, land and vehicles. In the inspection of business premises, the Commission is entitled to examine the books and other records related to the business, irrespective of the medium in which they are stored and to take copies thereof. This includes all databases, computers, tablets and other mobile devices and external information storage devices, such as external hard drives and cloud storages, as well as private devices that are used for work and are situated at business premises upon inspection⁸³. Furthermore, it has the right to seal the business premises, books or records. Lastly, the agents have the right to ask for explanations on relevant facts or documents and to record the answers.

If the company under inspection refuses to produce requested documents or give explanations requested, the Commission may take a decision on a fine or a periodic penalty payment. This decision is subject to appeal in the General Court.⁸⁴

⁸⁰ *Ibid*, p. 118. This was the case in *Almamet*, where the appealing company complained about an inspection carried out at the premises of another company. T-410/09, *Almamet v. Commission*, EU:T:2012:676.

⁸¹ De Jong and Wesseling 2016 p, 327.

⁸² Berghe and Dawes 2009, p. 410.

⁸³ Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation no 1/2003.

⁸⁴ Articles 23 and 24 Regulation 1/2003.

Where the Commission identifies an infringement of Articles 101 or 102 TFEU, it may order the company to end the infringement pursuant to Article 7 Regulation 1/2003 as well as impose a fine pursuant to Article 23 or/and a periodic penalty payment pursuant to Article 24 Regulation 1/2003. In the case-law of the CJEU, this decision is called final decision, which is the term that shall be used below⁸⁵. Also this decision is subject to appeal to the General Court under action for annulment pursuant to Article 263 TFEU.

Under Regulation 1/2003, the Commission has wide powers⁸⁶. It has the right to order an inspection and carry it out in compliance with the Regulation. The right to use coercive measures and carry out inspections at non-business premises is subject to prior authorization of national court⁸⁷, but the margin of appreciation of a national court is limited⁸⁸. Furthermore, the Commission has the power to impose a fine where it identifies an infringement of competition law⁸⁹. Thereby, the Commission has the powers to investigate a suspected infringement, carry out prosecutorial measures and take binding decisions⁹⁰. As pointed out by Schweitzer, among others, this brings about a potential prosecutorial bias – which must be balanced out with procedural safeguards as well as judicial review.⁹¹ From the perspective of the right to privacy pursuant to Article 8 ECHR, alone the power to carry out investigations triggers the requirement for effective safeguards and judicial review, as will be established below. The vast scope of Commission competences further highlights the need for effective control mechanisms.

The EU inspection is carried out by the Commission and assisting national authorities of the Member State in which the inspection takes place. The sanctions for breaches of Articles 101 and 102 TFEU are fines. However, the CJEU considers them punitive fines, whereby the nature of the process is criminal⁹². Similarly, the Human Rights Committee of the ECtHR

⁸⁵ See, for example, T-135/09, *Nexans France and Nexans v Commission*, EU:T:2012:596, para 132; Joined cases T-305/94 to T-335/94, *Limburgse Vinyl Maatschappij and Others v. Commission*, EU:T:1999:80, para 413.

⁸⁶ Andreangeli 2013, p. 177– 180; De Jong and Wesseling 2016, p. 326.

⁸⁷ Article 21(3) Regulation 1/2003.

⁸⁸ This will be addressed in further detail below.

⁸⁹ Depending on the turnover of the company, these fines may be significant. The fines imposed upon cartel participants may amount to billions of euros. See for example Commission Decision of 19 July 2016, *Trucks*, no 39824, where the five participant undertakings were fined a total of 2.9 billion euros.

⁹⁰ Schweitzer 2013, p. 491.

⁹¹ Schweitzer 2013, p. 491.

⁹² C-235/92, *Montecatini SpA v Commission*, EU:C:1999:362, para 176 and C-199/92, *Hüls AG v Commission*, EU:C:1999:358, para 150; Savola 2006, p. 855.

has labelled punitive fines as criminal in nature⁹³ whereas compensatory penalty payments are not, as established by the ECtHR⁹⁴.

2.2.4 Finnish Competition and Consumer Authority: investigator, adjudicator and proposal-maker

The competences of the Finnish Competition and Consumer Authority (“FCCA”) are based on Competition Act. These rights may be viewed as corollaries to the Commission inspection rights described above, as a part of the provisions are modelled after Regulation 1/2003⁹⁵. Major differences lie in the nature of the decisions taken and the competence to impose fines. The FCCA has the competence to investigate suspected breaches of Competition Act⁹⁶ and, on its own initiative or on the initiative of the Commission, investigate suspected breaches of EU competition regulations⁹⁷. Similarly, at the initiative of the Commission, the FCCA has the competence to assist Commission in carrying out an inspection in Finland. The procedural rules set out below are applicable to all situations above.⁹⁸

Section 31 provides the right to initiate proceedings upon finding that a company is acting in breach of the Competition Act or EU competition regulations. Competition Act does not include provisions regarding the content of the inspection decision, but in the preparatory works it is stated that the inspection decision must express in a sufficiently detailed way what is the purpose of the gathering of information and what is the legal basis thereof.⁹⁹ Contrary to the Commission decision to authorize an inspection, the FCCA decision authorizing an inspection is not considered a formal authority decision subject to appeal but a preparatory decision¹⁰⁰. Thereby, any suspected irregularities in the inspection decision may be appealed only in the context of potential proposal for a penalty payment to the Market Court.

Section 35 Competition Act provides the FCCA the right to carry out inspections on the business premises, storage facilities, land, and vehicles controlled by the undertaking.

⁹³ *Société Stenuit v France*, Application No 11598/85, 27 January 1992; Savola 2006, p. 855.

⁹⁴ *Neste St Petersburg et al. v Russia*, Application No 69042/01, 3 June 2004; Messina 2007, p.189.

⁹⁵ HE 88/2010 p. 36; Kuoppamäki 2014, p. 51.

⁹⁶ Section 5 Competition Act prohibits anticompetitive agreements and Section 7 Competition Act prohibits abuse of dominant position.

⁹⁷ Section 3 Competition Act provides that when the restraint may affect trade between Member States, also Articles 101 and 102 TFEU are applicable.

⁹⁸ Section 35 and Section 36(2) Competition Act.

⁹⁹ HE 88/2010, p.88. See also Aalto-Setälä 2015, p. 49.

¹⁰⁰ HE 243/1997: Hallituksen esitys Eduskunnalle laeiksi kilpailunrajoituksista annetun lain ja eräiden siihen liittyvien lakien muuttamisesta, p.35; Petäjäniemi-Björklund 2008, p. 460.

Section 36 provides the right to carry out inspections also on other premises, if a reasonable suspicion exists that books or other documents relating to the business and the object of investigation may be held there, and if these may have relevance in proving a serious violation of Finnish or European competition law. The latter inspection is subject to prior authorization of the Market Court, which enables the Market Court to prohibit the inspection if it considers it arbitrary or excessive¹⁰¹.

In the inspection of business premises, the FCCA – just like the Commission – has the right to examine the business correspondence, books, computer files, other documents, and data of an undertaking or association of undertakings, which may be relevant for ensuring compliance with competition law, and to take copies thereof. It also has the right to obtain information from an external service provider, who provides information storage services for the company under inspection, such as a cloud storage service provider¹⁰². As the existing legislation does not explicitly grant the right to inspect mobile devices such as mobile phones, the FCCA does not inspect them¹⁰³.

The Working Group proposes that the reformed Competition Act would grant the authorities the right to inspect all data irrespective of the storage device used. Thereby, also mobile phones and tablets would be subject to inspections¹⁰⁴. The report does not clarify if this is extended only to devices owned by the company, but the proposed reform would, by wording, enable the FCCA to inspect all devices containing data of the company. This formulation is very wide – and could bring personal devices situated at the company premises under inspection. This is the case with Commission inspection powers. The Working Group admits that such devices may contain information of individual employees of the undertaking that is protected by the right to privacy¹⁰⁵. The report does not propose any safeguards to limit the interference with this right, but it states that the FCCA should be particularly cautious when inspecting such devices¹⁰⁶.

The officials inspecting the data carry out a search by using relevant keywords and “other selection criteria that may be of relevance in detection of the matter under inspection”. Once

¹⁰¹ Section 36(3) Competition Act.

¹⁰² Section 37(2) Competition Act; HE 253/2014: Hallituksen esitys eduskunnalle laiksi kilpailulain 37 §:n muuttamisesta, p.1.

¹⁰³ Working Group Report, p.26.

¹⁰⁴ *Ibid*, p.26–27.

¹⁰⁵ *Ibid*, p. 27.

¹⁰⁶ *Ibid*, p. 27.

the officials have identified the materials that are relevant in detection of the mater under inspection, these materials are copied for the use of the authority, and they are also handed to the company under investigation. The authority destroys other materials and temporary copies.¹⁰⁷

Furthermore, the FCCA has the right to seal the business premises, business correspondence, documents, and data for a period necessary for the investigation. Lastly, the officials have the right to ask for explanations on relevant facts or documents and to record the answers.¹⁰⁸ As for now, the right is limited to inspections of business premises, but as stated above, the Working Group proposes that this right would be extended also to inspections carried out on non-business premises¹⁰⁹. Majority of the competition authorities of EU Member States have this right¹¹⁰, and it is recommended by the European Competition Network¹¹¹.

The Working Group proposes also the possibility to continued inspections at the premises of the FCCA or at the premises of other state authorities, when the inspected material is “data”, the concept of which covers all information in a computer or an equivalent information system or the data carrier.¹¹² Data materials include, among others, back-up copies from external servers, email dossiers and information contained in servers. The inspected data would be a temporary copy of the original. To safeguard the inspected data, the inspection should be carried out in a designated room or rooms and only authority officials identified in the inspection decision have access to the data.¹¹³ The right to inspect data at the premises of the FCCA would be limited exclusively to the copies of the data, and the original data would remain at the disposal of the undertaking.¹¹⁴ Pursuant to the Working Group, the undertaking and its legal representative would have the right to be present also in the continued inspection. The FCCA would inform the undertaking of the dates it carries out the inspection of the materials.¹¹⁵

¹⁰⁷ Berglund, Peter, the data specialist of the FCCA in *Ibid*, p. 21–22.

¹⁰⁸ Section 37(1) and 37(3) Competition Act.

¹⁰⁹ Working Group Report, p. 41–42.

¹¹⁰ ECN Recommendation on powers to investigate enforcement measures 9 December 2013, p. 27.

¹¹¹ ECN recommendation on the power to collect digital evidence 18 November 2013, p. 13.

¹¹² Working Group Report, p. 19–20.

¹¹³ *Ibid*, p 20–21.

¹¹⁴ *Ibid*, p. 25.

¹¹⁵ *Ibid*, p. 23.

Where the FCCA establishes an infringement of Competition Act or Articles 101 or 102 TFEU, it may order an undertaking to bring competition infringement to an end¹¹⁶. Contrary to the Commission, the FCCA does not have the competence to take decision imposing fines. Based on its investigation, it may make a proposal to penalty payment for the Market Court¹¹⁷, which for its part assesses the evidence provided and takes final decision concerning the infringement and the amount of fine¹¹⁸. Thereby, the final decision in competition infringement cases is taken by the Market Court, not by the FCCA.

According to legal literature and preparatory works, the procedure to investigate suspected breaches of competition law, to which the inspection is a part of, is administrative in nature¹¹⁹. However, the Supreme Administrative Court recently stated that penalty payments for breaches of competition law fall in the ambit of Article 6(1) ECHR¹²⁰, with a reference to case *Jussila v Finland*, in which a tax surcharge was established to be of criminal nature because it was punitive and with a deterring aim¹²¹. Thereby, it is possible that the Supreme Administrative Court ruling is a change in this discourse. This has, however, mainly repercussions to procedural requirements and relevance regarding Article 6 ECHR.

3. Right to privacy: human right, fundamental right, and many things more

3.1 Right to privacy: introduction

The right to privacy is a very vast concept and depending on the context, it covers various fields from data protection to right to abortion, last name or even protection against environmental harm¹²². Marks and Clapham describe the right to privacy as a “catch-all human right”, which covers all the fields of human life that are not protected under other rights¹²³. Pursuant to Michael, the right to privacy is the most difficult human right to define and confine¹²⁴. The right to privacy has two dimensions: it may be described as the right to our own physical integrity, property and thoughts as well as the right to information and

¹¹⁶ Section 9 Competition Act.

¹¹⁷ Section 12 Competition Act.

¹¹⁸ Chapter 2 Section 1(2) Oikeudenkäynnistä markkinaoikeudesta annettu laki; Section 51(1) Hallintolainkäyttölaki, and Section 13 Competition Act.

¹¹⁹ Hiltunen, Kuoppamäki and Laine 2013, p. 67; Kilpailulaki 2010 -työryhmä 2009, p. 46–51; HE 162/1991: Hallituksen esitys eduskunnalle laiksi kilpailunrajoituksista, p. 5 and 12.

¹²⁰ KHO 2016:221, Valio v KKV, para 245.

¹²¹ *Jussila v Finland*, Application no. 73053/01, 23 November 2006-

¹²² The term was used for the first time by Samuel D. Warren and Louis D. Brandeis in their article ‘The Right to Privacy’ in Harvard Law Review, Volume IV, No 5, 15 December 1890. See Marks and Clapham 2005, p. 260.

¹²³ Marks and Clapham 2005, p. 263.

¹²⁴ Michael 1994, p. 1.

knowledge concerning us¹²⁵. In this thesis, the focus is on the first dimension of the right to privacy. The second dimension of data collection and data protection is left out.

Right to privacy protects natural and legal persons from arbitrary actions of public authorities. In this way, the core of the right is the limitation of state power, which means that state may interfere with the private aspects of life only for – to put it simply – a good reason¹²⁶. To protect the right, the state may also have the duty to protect individuals from interferences by non-state actors¹²⁷, but this aspect is beyond the scope of this work.

The ECHR, CFR or the Finnish Constitution (“FC”) do not employ the word privacy. The ECHR provides the right to respect for private and family life, home and correspondence in Article 8 ECHR. The CFR includes a corresponding right in Article 7 CFR, but the word “correspondence” is replaced with “communications”. The FC provides by Section 10 that the private life, honour and the sanctity of the home are guaranteed¹²⁸. The ECtHR does not use the term right to privacy in its judgements when referring to Article 8 ECHR. The CJEU, for its part, refers to a multitude of terms, right to respect for privacy included¹²⁹. The term is widely employed in legal literature, where it is generally used to address the rights protected by Article 8 ECHR, by Article 7 CFR and as a general principle of EU law as well as a constitutional right in Finland. In this way, the term “right to privacy” is used to address only part of the potential dimensions of the concept. I use the term in the same way, excluding the dimension of data protection.

The ECtHR has its own interpretation of the right to privacy, as do the EU and Finland. The ECtHR case-law gives an extensive explanation of the right, as it has applied Article 8 ECHR thousands of times. This concept of privacy is relevant in the EU as well, as Article 7 CFR is modelled after Article 8 ECHR¹³⁰, and the CJEU has referred to Article 8 ECHR in various cases, and sometimes even applied it. Finland, as established above, is bound by the ECHR, which means that “privacy” should be protected at least at the level prescribed by the ECHR.

¹²⁵ *Ibid*, p. 3 and 133.

¹²⁶ Marks and Clapham 2005, p. 260–261; Neuvonen 2014, p. 16; In the context of ECHR, see *Niemietz v. Germany*, Application no. 13710/88, 16 December 1992, para 31.

¹²⁷ Viljanen 1996, p. 803; *Niemietz v. Germany*, para 29.

¹²⁸ In the unofficial Finnish translation, the title of the section is incorrectly “the right to privacy”.

¹²⁹ In *Nexans*, the Court refers to right to respect for privacy, in *Deutsche Bahn* to inviolability of private premises, in C-94/00, *Roquette Frères v. Commission*, EU:C:2002:603, to sphere of private activities of any person, natural or legal.

¹³⁰ Explanations relating to the Charter of Fundamental Rights of the European Union (2007/C 303/02), p. 4.

However, the Finnish legal system has also an autonomous concept of privacy – or private life – which is protected by Section 10 FC. This right differs from the right protected under Article 8 ECHR – especially when the rights of companies are in question. The difference is not always fully acknowledged in Finland.

In the following chapters, I will provide a definition of the right to privacy as it is applicable to companies and more precisely, companies subjected to authority inspections. I will start with the definition of the ECHR, as that sets the standard for contracting states such as Finland and, to a limited extent, to the EU as well. The EU law concept of privacy and the Finnish constitutional right to privacy will be examined to the extent that is necessary to highlight relevant differences between the concepts. Once this is done, it is time to address the safeguards to the right and the differences between different jurisdictions.

3.2 Companies right to privacy in competition authority inspections pursuant to ECHR

3.2.1 Introduction to Article 8 ECHR: what it protects, whom it protects, and why it protects

Article 8 ECHR provides by its first paragraph that everyone has a right to respect for his private and family life, his home and his correspondence. The second paragraph sets out the rules for legitimate interferences with this right. The essential purpose of Article 8 ECHR is to protect individuals from arbitrary actions of public authorities¹³¹, and to limit all legitimate interferences to sheer necessity. This chapter will define the substance of the rights protected under Article 8 ECHR in the context of undertakings and competition authority inspections.

As will be explained in greater detail below, Article 8 ECHR provides protection to both natural persons and legal persons. The ECHR is a human rights instrument, but some of these rights are extended to legal persons as well, undertakings included¹³². This is enabled by Article 34 ECHR, which provides that persons, non-governmental organizations and groups of individuals have access to the ECtHR. Pursuant to the ECtHR, the term “non-governmental organizations” includes, among others, legal entities, companies, foundations and associations¹³³.

¹³¹ *Niemietz v. Germany*, para 31.

¹³² On historical development on the human and fundamental rights of companies, and analysis on ECHR articles applicable to companies, see Muijsenbergh and Rezai 2012; Emberland 2006.

¹³³ Oliver 2015, p. 677.

Article 8 ECHR protects a variety of rights¹³⁴, and only a part of them is relevant for companies. Companies under state authority inspection may enjoy the right to respect to home, correspondence and, in certain limited circumstances, private life. The right to respect to home provides the protection of company premises and home premises of individual employees and the right to protection of correspondence provides protection to company correspondence between a lawyer and a client, which is protected by the legal professional privilege (“LPP”). The right to protection of private life is relevant only in the case of natural persons, which means individual entrepreneurs or the individual employees of companies, in which case they enjoy the protection of private information included in the documents the authority copies or inspects. As competition authority inspections by their nature take place at the premises of the company and often include the risk of inspection of documents labelled as privileged correspondence, they normally interfere with at least one of the rights protected under Article 8 ECHR.

3.2.2 Inspection or search – and why it does not really matter

The ECHR sets limitations to the inspection rights of authorities of contracting states mainly through Article 8 ECHR, which provides the right to privacy. Also other provisions, including Article 6 ECHR and rights of defence protected under it, are relevant. At the outset, contracting states retain the right to carry out inspections and searches when investigating offences¹³⁵. The ECtHR has formulated that such measures may be acceptable to obtain physical evidence of certain offences¹³⁶, including anti-competitive practices¹³⁷. This entails that competition inspections, at the outset, are acceptable measures under the ECHR.

The inspections and searches investigated by the ECtHR have been either administrative procedures or criminal procedures, depending on the national legislation and practice. Some of the provisions of the ECHR, namely Article 6 ECHR, draw a distinction between criminal procedures and other procedures¹³⁸. For the application of Article 8 ECHR, the nature of the

¹³⁴ See Mowbray 2007, p 488–597; Marks and Clapham 2005, p. 264–267; Kilkelly 2003; for historical comparison Morisson 1967, p. 133.

¹³⁵ *Société Colas Est and others v. France*, Application no. 37971/97, 16 April 2002, para 47

¹³⁶ *Société Colas Est and others v. France*, para 48, *Delta Pekárny A.S. c. République Tchèque*, Requête no 97/11, 2 octobre 2014, para 83.

¹³⁷ *Société Colas Est and others v. France*, para 48, *Delta Pekárny A.S. c. République Tchèque*, para 83, *Vinci Construction et GTM Génie Civil et Services c. France*, Requêtes nos 63629/10 et 60567/10, 2 avril 2015 para 74.

¹³⁸ However, also administrative procedures may produce consequences comparable to criminal, see ECtHR Guide 2013, p.9.

procedure is not decisive. Pursuant to the case-law of the ECtHR, the interpretations developed in administrative cases are applicable to criminal ones and vice versa. The ECtHR has held that these situations are comparable¹³⁹. Furthermore, in *Société Colas* the ECtHR held that an inspection interferes with the rights protected under Article 8 ECHR irrespective of the inspecting authority¹⁴⁰. Thereby, both the inspections of competition authorities¹⁴¹ and police officers constitute an interference with Article 8 ECHR rights. All authority measures that include an entry into premises or inspection of documents without the consent of the subject of the right amount to an interference. What is decisive is the entry into a protected sphere without a permission¹⁴².

In *Berhn Larsen*, the ECtHR held that where the authority inspection is not enforceable on the pain of criminal sanctions but may lead to purely administrative consequences, such as discretionary tax assessment, it is not comparable to a search under criminal law¹⁴³. However, this only led the ECtHR to conclude that the interference with Article 8 ECHR rights was not as severe as in majority of the cases concerning searches and seizures under criminal law. It was, nevertheless, considered as an interference. In this way, the ECtHR held that the measure was not as coercive as the ones taken as a part of a criminal procedure or those sanctioned in a punitive way but it nevertheless interfered with the protected sphere. The word administrative was used here within the meaning of “non-punitive”. Thereby, the case does not limit the applicability of interpretations developed in criminal investigation searches to cases concerning administrative inspections.

Thereby, all interpretations developed in the judgements of the ECtHR are relevant, irrespective of the administrative or criminal nature of the proceedings under national law. Furthermore, the point made in *Berhn Larsen* is not relevant in the context of the inspections of the FCCA. The Finnish penalty payments are not comparable to purely administrative consequences such as discretionary tax assessment, but they entail features of a punitive

¹³⁹ For examples of competition authority inspections, see *Wieser and Bicos Beteiligungen GmbH v. Austria*, Application no. 74336/01, 16 October 2007, para 57; *Delta Pekárny A.S. c. République Tchèque*, para 83.

¹⁴⁰ *Société Colas Est and others v. France*, para 46; *Husabø and Strandbakken* 2005, p. 138.

¹⁴¹ The case concerned an inspection carried out by competition authorities. The rule should be applicable also to other authorities, as the decisive factor was the measure of inspection, not the field of the authority.

¹⁴² *Zosymov v. Ukraine*, Application no. 4322/06, 7 July 2016, para 59 and *Belousov v. Ukraine*, Application no. 4494/07, 7 November 2013, paras 102 and 105–107. Both cases concerned individuals.

¹⁴³ *Berhn Larsen Holding As and others v. Norway*, Application no. 24117/08, 14 March 2013, paras 43, 106, 156 and 173.

sanction in the way the ECtHR has interpreted it. This is also the case with Commission sanctions.

3.2.3 Right to respect to home: business premises as protected spheres

The right to respect to home was extended to business premises in 1992 in the case *Niemietz*¹⁴⁴. In that case, the Court held that a lawyer's home office was protected under the article. It based its reasoning on two aspects. Firstly, it considered that the French text of the ECHR employs the word “*domicile*”, which may cover also a professional person's office. Secondly, the Court noted that professional activities may be carried in domestic premises and vice versa, which means that it is not possible to always separate those two.¹⁴⁵ Until 2002, this right was applicable to the business premises of natural persons¹⁴⁶.

With the judgement of *Sociétés Colas*, the Court stated that also a company's registered office, branches or other business premises may enjoy protection under Article 8 ECHR in certain circumstances¹⁴⁷. In that case, an inspection at the company's head office and branches carried out by the French competition authority, which included the seizure of several thousand documents, amounted to “certain circumstances”¹⁴⁸. Since 2005, the Court has mostly applied the rule without the additional requirement of “certain circumstances” and concluded that the concept of “home” covers the registered office of a company run by a private individual and a juristic person's registered office, branches and other business premises¹⁴⁹. In *Delta Pekárny* in 2014, the Court repeated the limitation of “certain circumstances”¹⁵⁰, but ever since *Sociétés Colas*, the business premises of undertakings under inspection enjoy, as a general rule, the right to respect to home¹⁵¹. In this way, the

¹⁴⁴ *Niemietz v. Germany*; Also *Chappell v. the United Kingdom*, Application no. 10461/83, 30 March 1989 concerned business premises, but the applicant also had their residence in the premises whereby it was possible to consider it as a home in the more limited sense of the concept.

¹⁴⁵ *Niemietz v. Germany*, para 30

¹⁴⁶ *Société Colas Est and others v. France*, para 30; *Saint-Paul Luxembourg S.A. v. Luxembourg*, Application no. 26419/10, 18 April 2013, Partly dissenting opinion of Judge Jäderblom.

¹⁴⁷ *Société Colas Est and others v. France*, para 41.

¹⁴⁸ *Ibid*, para 42.

¹⁴⁹ *Buck v. Germany*, Application no. 41604/98, 28 April 2005, para 31; *Petri Sallinen and others v. Finland*, Application no. 50882/99, 27 September 2005, para 70. See also the European Court of Human Rights the Annual report 2005 p. 75. Recently repeated in *Lindstrand Partners Advokatbyrå Ab v. Sweden*, Application no. 18700/09, 20 December 2016, para 83.

¹⁵⁰ *Delta Pekárny A.S. c. République Tchèque*, para 77.

¹⁵¹ Certain premises have been excluded. In *Khamidov c. Russie*, Requête no72118/01, 15 novembre 2007, the Court held that a mill, bakery and warehouses did not fall under the concept of “home” even within its broader meaning of business premises. In *Leveau et Fillon c. France*, Requêtes nos 63512/00 et 63513/00, 6 septembre 2005, a pigsty was excluded from the scope of the article.

ECtHR has included undertakings in the concept of “everyone” set out in Article 8 ECHR. Thereby, the inspection carried out in such premises must fulfil the requirements set out in the second paragraph of Article 8 ECHR.

3.2.4 Right to respect to correspondence: protection of legal professional privilege

In majority of the cases concerning the rights of companies under authority inspections under Article 8 ECHR, the Court settles in finding an interference with the right to respect to home. Where a company has pleaded interference with their correspondence that does not contain communication between a lawyer and a client, the ECtHR has not examined an interference with that right but has taken the claim into account in the overall assessment of an interference with Article 8 ECHR¹⁵². An interference with the right to respect to correspondence is examined where the inspected documents contain materials protected under legal professional privilege (“LPP”). The Court has highlighted the importance of correspondence between a lawyer and client, and explicitly stated that such communication enjoys enforced protection under the Convention¹⁵³. This right is a corollary of the right against self-incrimination, which is protected under Article 6 ECHR¹⁵⁴ – but documents containing privileged communication are nevertheless protected under Article 8 ECHR, whereby all interferences are subject to safeguards of under this article.

The case-law on legally privileged correspondence has, for the most part, been developed in cases concerning inspections and searches in the offices of individual lawyers or law firms. In these cases, the inspection inevitably covers also documents protected under LPP¹⁵⁵. *Niemetz* was a landmark case also in this regard. First, the Court concluded that the protection of correspondence covers also professional correspondence. The Court based its reasoning on earlier case-law, in which telephone calls of professional nature and

¹⁵² *Delta Pekárny A.S. c. République Tchèque*, para 65 and 78; *Bernh Larsen Holding As and others v. Norway*, Application no. 24117/08, 14 March 2013, para 106.

¹⁵³ *Brito Ferrinho Bexiga Villa-Nova*, Requête no 69436/10, 1 décembre 2015, para 55; *Michaud v. France*, Application no. 12323/11, 6 December 2012, paras 117–118.

¹⁵⁴ *Brito Ferrinho Bexiga Villa-Nova*, para 55; *André and another v. France*, Application no. 18603/03, 24 July 2008; para 41; *Funke v. France*, Application no. 10828/84, 25 February 1993, para 44.

¹⁵⁵ *Sérvulo & Associados – Sociedade de Advogados, RL et autres c. Portugal*, Requête no 27013/10, 3 septembre 2015, para 92; *Yuditskaya and others v. Russia*, Application no. 5678/06, 12 February 2015, para 25; *Bernh Larsen Holding As and others v. Norway*, para 106; *Sorvisto v. Finland*, Application no. 19348/04, 13 January 2009, para 104; *Wieser and Bicos Beteiligungen GmbH v. Austria*, , para 45; *Petri Sallinen and others v. Finland*, para 71; *Elci and Others v. Turkey*, Applications nos. 23145/93 and 25091/94, 13 November 2003

correspondence with a lawyer had been found to enjoy protection under Article 8 ECHR.¹⁵⁶ Second, the Court established that the inspection of data including *correspondence between a lawyer and their clients* is an interference with Article 8 ECHR.¹⁵⁷ In *Wieser and Bicos* the Court held that the right protects also undertakings¹⁵⁸. It drew its conclusion by analogy from the case-law that extends the concept of "home" to "business premises".¹⁵⁹ *Wieser and Bicos* concerned an undertaking owned by a lawyer. In *Vinci*, the Court established that also a company operating on another field may be subject to this kind of an interference, if it establishes that the inspection has led to seizure or copying of privileged materials.¹⁶⁰

The protected correspondence may be in any form. In *Frérot and Michaud*, in the context of natural persons, the ECtHR concluded that Article 8 ECHR protects the confidentiality of *all the exchanges* in which individuals may engage for the purposes of communication and that applies to all communications irrespective of their form.¹⁶¹ This includes, among others, electronic data¹⁶², electronic files and electronic messages.¹⁶³ The cases concerned natural persons. The ECtHR has not established if this interpretation applies also to legal persons, but this could well be the case, as the ECtHR appears to assess a potential interference irrespective of the form of the communications also in those cases. In *Lindstrand Partners*, the Court held that the search in two offices in a law firm, in which inspectors "examined the contents of cupboards, shelves, computers and a safe" amounted to an interference with the applicant company's right to respect for correspondence.¹⁶⁴

In case-law concerning legal persons, the Court has not clarified what kind of communication falls within the definition of LPP. In *Campbell* the Court formulated, in a case concerning the rights of a natural person held in prison, that Article 8 ECHR protects

¹⁵⁶ *Niemietz v. Germany*, para 32. The earlier case-law was developed in the context of phone tapping and rights of prisoners: *Huvig v. France*, Application no. 11105/84, 24 April 1990 (phone tapping); *Schönenberger and Durmaz v. Switzerland*, Application no. 11368/85, 20 June 1988, and *Campbell v. the United Kingdom* (prisoners' right to correspondence)

¹⁵⁷ *Niemietz v. Germany*, para 32.

¹⁵⁸ *Wieser and Bicos Beteiligungen GmbH v. Austria*, para 45.

¹⁵⁹ *Ibid*, para 45.

¹⁶⁰ *Vinci Construction et GTM Génie Civil et Services c. France*, paras 69, 72 and 77.

¹⁶¹ *Frérot v. France*, Requête no 70204/01, 12 June 2007, para 53; *Michaud v. France*, para 90.

¹⁶² *Servulo & Associados – Sociedade de Advogados, RL et autres c. Portugal*, para 76; *Robathin v. Austria*, Application no. 30457/06, 3 July 2012, para 39 ; *Wieser and Bicos Beteiligungen GmbH v. Austria*, para 45.

¹⁶³ *Posevini v. Bulgaria*, Application no. 63638/14, 19 January 2017, para 57; *Vinci Construction et GTM Génie Civil et Services c. France*, paras 69 and 77.

¹⁶⁴ *Lindstrand Partners Advokatbyrå Ab v. Sweden*, para 86.

all correspondence between a lawyer and a client, whether it is related to litigation or not.¹⁶⁵ The Court has not provided a similar interpretation in the context of legal persons, but it simply refers to communication between a lawyer and a client. Nevertheless, it has not set out any limitations to LPP, such as the membership in the bar or the absence of employment relationship between the lawyer and the client, which are requirements provided by EU law. Moreover, it has not stated that only documents related to the matter under investigation would be protected by LPP, which is the case in the EU. There may be two reasons for this: firstly, the authorities are not entitled to inspect documents outside the inspection decision or warrant whereby such documents are out of scope by their nature or secondly, more interestingly, the Court considers the *Campbell* rule to be applicable also to legal persons. This reading is encouraged by the fact that LPP is protected as a part of privacy and not exclusively as a right of defence. However, the contracting parties maintain a wider margin of discretion when it comes to legal persons. Thereby, national legislation could possibly introduce some limitations in this regard, but the Court would be very likely to be critical towards such limitations and require strong justifications.

3.2.5 Right to respect to private life: how private is office life?

The right to respect to private life is limited to natural persons. Inspections and searches of business premises may interfere with the right, but in that case, it is always the right of an individual professional or a company employee. Thereby, this aspect of the article is of lesser importance from the perspective of companies. The right to respect for private life may, however, be taken into account in the overall assessment of the interference and its proportionality.

In an inspection or a search, the interference usually takes place via inspection of documents that contain information related to the private life of an individual. Where the inspection takes place at the business premises of natural persons who exercise liberal professions¹⁶⁶, the right to private life covers activities of professional or business nature¹⁶⁷ where they include interactions with others¹⁶⁸, including personal connections developed in the

¹⁶⁵ *Campbell v. the United Kingdom*, para 48; repeated in *inter alia* *Michaud*, para 117..

¹⁶⁶ *Niemietz v. Germany*, paras 29–33; *Mialhe v. France (No. 1)*, Application no. 12661/87), 25 February 1993, para 28..

¹⁶⁷ *Niemietz v. Germany*, para 20.

¹⁶⁸ *Van Vondel v. the Netherlands*, Application no. 38258/03, 25 October 2007, para 48.

profession¹⁶⁹ and also professional secrets¹⁷⁰. These rules have been developed in cases where the applicant is a lawyer, but this assessment was not based on the nature of their work but the fact that in many a profession, the spheres of personal and professional life interlink. In these cases, the subject of interference has been the applicant, whereby the Court has carried out an in-depth analysis.

Regarding natural persons who are individual employees of companies, the case-law is less developed. The question has been addressed only in the context of company inspections, which has set limitations to the assessment. In *Bernh Larsen* the Court stated that it does not assess an interference with the private life of an individual if this individual has not personally complained. However, the Court formulated that personal emails and correspondence of employees and other persons working for the company fall within the sphere of private life. Moreover, the Court stated that companies have a legitimate interest to protect the privacy of their employees. This interest is taken into account when assessing the proportionality of authority measures. It also has an impact when assessing the merits of the case.¹⁷¹

What this means in practice is that even if the inspection of private documents of employees is not, *per se*, an interference from the perspective of the employer company, it still has repercussions in this regard. The inspection of such documents needs to be justified, proportionate and the authority should take all possible measures to avoid the inspection of such documents.

3.2.6 Difference in treatment of individuals and undertakings

The ECtHR extends the protection of Article 8 ECHR to legal persons, but the protection is not necessarily equivalent to that of natural persons. The ECtHR has repeatedly held that the interferences with Article 8 ECHR rights may be more far-reaching where business premises of a juristic person are concerned¹⁷². This means that the contracting states retain a margin of appreciation regarding the measures they wish to take in investigating suspected breaches of law. Pursuant to the ECtHR, this margin must be used in good faith, carefully and in a

¹⁶⁹ *Golovan v. Ukraine*, Application no. 41716/06, 5 July 2012, para 53

¹⁷⁰ *Brito Ferrinho Bexiga Villa-Nova*, para 44.

¹⁷¹ *Bernh Larsen Holding As and others v. Norway*, para 90 and 107.

¹⁷² *Niemietz v. Germany*, para 31; *Société Colas Est and others v. France*, para 49; *Delta Pekárny A.S. c. République Tchèque*, para 82; *Bernh Larsen Holding As and others v. Norway*, para 159; *Panteleyenko v. Ukraine*, Application no. 11901/02, 29 June 2006, para 47.

sound manner¹⁷³.

The Court has not specified, what more far-reaching measures mean in practice. However, it may be concluded that state authorities may carry out more extensive inspections or searches when they take place in business premises or where the materials under inspections are those of companies. What is noteworthy is that even if more intrusive measures are accepted, the normal safeguards against arbitrariness are, pursuant to the ECtHR, applicable to legal persons as well.

3.3. Companies right to privacy in competition authority inspections in European Union

3.3.1 Right to privacy as fundamental right and general principle

As established above, the fundamental rights of individuals and undertakings within the EU are protected by a variety of instruments. Firstly, there is the CFR, secondly, the general principles of EU law and thirdly, the ECHR still has its influence. This is also the case with the right to privacy of companies under authority inspections. After the CFR gained the status of primary law, Article 7 CFR is, at least in theory, the most central means of protection. Pursuant to Article 7 CFR, everyone has the right to respect for his or her private and family life, home and communications.

Pursuant to Explanations relating to the Charter of Fundamental Rights¹⁷⁴, the rights guaranteed under Article 7 CFR correspond to the rights guaranteed by Article 8 ECHR. This entails that the meaning and the scope of the two rights are the same. Furthermore, pursuant to Article 52(3) CFR, the ECHR sets out the minimum level of the right and the EU may provide more extensive protection. The Explanations further provide that also the limitation doctrine is the same, meaning that the interferences to the right must be necessary and proportionate.¹⁷⁵ However, in practice the limitation clause set out in Article 52(1) CFR is not the same as in Article 8 ECHR. It adds objectives of general interest recognised by the Union as a further requirement for a limitation. The interpretation provided in the Explanations has a formal legal status, which is explicitly stated in Article 52(7) CFR as well as in Article 6(1) TEU¹⁷⁶.

¹⁷³ *Vinci Construction et GTM Génie Civil et Services c. France*, para 65; *Delta Pekárny A.S. c. République Tchèque*, para 82; *Société Canal Plus et Autres c. France*, Requête no 29408/08, 21 décembre 2010, para 54.

¹⁷⁴ Explanations relating to the Charter of Fundamental Rights of the European Union (2007/C 303/02)

¹⁷⁵ *Ibid*, p. 4.

¹⁷⁶ Miettinen and Kettunen 2015, p. 151–152; Weiss 211, p. 187.

Irrespective of the presumption of corresponding scope and meaning, the interpretations of the two courts are not fully in line. The right to respect for business premises is, to a great extent, a corresponding right but the EU does not, for example, apply Article 7 CFR in the context of LPP documents. Vested-Hansen – who rather unconventionally addresses Articles 7 CFR and 8 ECHR under the title “right to private life” – reminds that the rights have an autonomous meaning in both legal systems.¹⁷⁷ As will be established in Chapter 4.3, also the safeguards differ.

Moreover, the way to apply the articles is different. Whilst the ECtHR often addresses the interference with one of the rights protected under Article 8 ECHR, such as that to home, correspondence or private life, the CJEU have chosen a different approach in the context of competition inspections. It mainly refers to Article 8 ECHR or Article 7 CFR in their entirety, and bundles the rights provided under one concept of “privacy”¹⁷⁸. This may be a consequence of the historical development of the right in the EU, as the inspection powers were initially measured against the general principle of protection of the sphere of private activities. Article 8 ECHR was introduced only later.

3.3.2 Right to respect for home: from protection against arbitrariness to protection of business premises

In European Union, companies have enjoyed a certain protection against coercive authority measures in their business premises since 1962. In 1962, the CJEU formulated that it withholds the power to examine if the measures of investigation undertaken by the Commission¹⁷⁹ are excessive¹⁸⁰. In *National Panasonic* 1980, the applicant company pleaded a violation of Article 8 ECHR, and the Court assessed if the legal framework regarding the legality and necessity of Commission investigations fulfills the criteria set out in paragraph 2 of the article. What is noteworthy is that the CJEU stated that it is unclear if the article is in fact be applicable to the applicant as a legal person.¹⁸¹

In *Hoechst* in 1989, the Court stated that the protection against arbitrary or disproportionate intervention is a general principle of EU law. The Court formulated that the principle is

¹⁷⁷ Vested-Hansen 2014, p. 155.

¹⁷⁸ *Roquette Frères v. Commission*, para 59; *Nexans France and Nexans v Commission*, para 30.

¹⁷⁹ At that time, the investigating authority was called High Authority. In C-46/87 and 227/88, *Hoechst v. Commission*, EU:C:1989:337, para 19 the Court quotes the original judgement by replacing the term High Authority with Commission, which is why I also use the term in the text.

¹⁸⁰ Cases C-5/62 to 11/62, 13/62 to 15/62, *San Michele and Others v. Commission*, EU:C:1962:46, p. 462.

¹⁸¹ Case 136/79, *National Panasonic v. Commission*, EU:C:1980:169, paras 19 and 20.

applicable in the sphere of private activities and it provides protection to both natural and legal persons.¹⁸² However, in this case, the Court explicitly held that the right to respect for home, as it is defined in the laws of Member States and as provided by Article 8 ECHR and interpreted by the ECtHR, does not protect business premises¹⁸³. This statement was fully in line with the prevailing interpretation of the ECtHR, this case was decided prior to the issuance of *Niemietz* judgement.

The right to respect for home was extended to business premises in 2002. With *Roquette Frères*, the CJEU established that the protection of home is also extended to business premises. In drawing this conclusion, the CJEU referred to *Hoechst* and the way the jurisprudence of the ECtHR influenced the content and scope of the right to respect for home. The Court also repeated the limitation set out in *Société Colas*, according to which protection is extended to such premises "under certain circumstances". Furthermore, the CJEU reminded that an interference with the right may be more far-reaching regarding business premises than regarding spaces of permanent habitation¹⁸⁴.

3.3.3 Right to legal professional privilege – but not under Article 8 ECHR or Article 7 CFR

As established above, for ECtHR, the correspondence between a lawyer and a client company is subject to protection under the right to respect for correspondence. The CJEU has not reached the same conclusion. The CJEU has not assessed the correspondence dimension of neither Article 8 ECHR nor Article 7 CFR. EU law provides protection for legally privileged communications as a general principle of law.

The principle, which protects the communication between the company and an external lawyer, was established in *AM&S*. The CJEU concluded that written communication between a lawyer and client company is protected under two cumulative conditions, according to which the communications must be between an external lawyer and the client company and related to the rights of defence of the company in question.¹⁸⁵ Thereby, only communications related to the matter under investigation is protected by LPP, whether it is issued prior the investigation or after it¹⁸⁶. Moreover, this principle is applicable to lawyers

¹⁸² *Hoechst v. Commission*, para 19.

¹⁸³ *Ibid*, paras 17 and 18.

¹⁸⁴ *Roquette Frères v. Commission*, para 29.

¹⁸⁵ C-155/79, *AM&S*, EU:C:1982:157, para 21.

¹⁸⁶ *Ibid*, para 23

practicing in any Member State¹⁸⁷. This principle sets boundaries to the inspection rights of the Commission. Pursuant to the CJEU, a company may refuse to produce documents if it is able to provide the Commission with evidence of the privileged nature of the documents.¹⁸⁸ In *Hilti*, the Court concluded that also internal notes of a company that exclusively communicate legal advice from an external lawyer, are covered by LPP¹⁸⁹. *Akzo Nobel* confirmed the rule and added that LPP protects also documents that are drafted to seek legal advice from an external lawyer with the aim of exercising the company's rights of defence.¹⁹⁰ Consequently, LPP covers various types of documents but it is exclusively limited to communication with an external lawyer that is not employed by the company under investigation. The CJEU has only addressed Commission investigations in its case-law, whereby the definition of LPP is only relevant in the context of Commission inspections¹⁹¹. Inspections carried out by the national competition authorities, even when they are carried under Articles 101 and 102 TFEU, are subject to national rules governing LPP¹⁹². As will be stated later, in Finland the scope of protection is similar.

Andersson has identified two potential deficiencies in the protection provided by the EU. Firstly, she points out that in *AM&S*, the Court limited the protection to lawyers practicing in one of the Member States of the Union and secondly, that the protection covers only documents that are related to the subject-matter of the investigation. Consequently, *Andersson* sees two potential exceptions where legal advice is not, after all, covered by LPP: communications with lawyers situated outside of the European Union and legal correspondence that is not related to the matter under investigation. However, she points out that the Commission has not inspected such materials¹⁹³. It is possible that the requirement of membership in a Member State bar could be lifted by the CJEU, as it has highlighted the inviolability of the relationship between a lawyer providing legal advice and a client seeking for advice. However, the second requirement of documents being related to the matter under investigation appears to be of more permanent nature. Pursuant to the case-law, the CJEU views LPP exclusively as a part of rights of defence – and not as form of protected

¹⁸⁷ *Ibid*, paras 25 and 26.

¹⁸⁸ *Ibid*, paras 27 and 29. The procedure of establishing this nature is addressed in Chapter 4.3.2.

¹⁸⁹ T-30/89, *Hilti v. Commission*, EU:T:1991:70.

¹⁹⁰ T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd v. Commission*, EU:T:2007:287, para 173 in fine. Confirmed by the ECJ in C-550/07 *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, EU:C:2010:512, para 51.

¹⁹¹ Frese 2011, p. 202–203.

¹⁹² *Akzo Nobel* para 102; *Ibid*, 204.

¹⁹³ *Andersson* 2017, p. 366–372.

communication that amounts to a right on its own. However, it is not possible to effectively conclude that the definition of LPP would, in the context of companies, be different from that pursuant to ECHR. As stated above in Chapter 3.2.4, the ECtHR has provided a vast reading of LPP in the context of rights of natural persons but it has not clarified if this is the same also regarding legal persons. Moreover, it is noteworthy that when it comes to rights of defence, LPP protection is stronger whereby under Article 8 ECHR, the Convention provides the possibility to interfere with the right in proportionate manner.

3.3.4 Companies' right to private life: question of secondary importance?

The ECtHR has clearly formulated that even if the right to respect to home and correspondence within the meaning of communication between a lawyer and a client is extended to companies, the right to private life is reserved for natural persons. In the absence of an individual complaining a violation of this right, this aspect is taken into account only in the overall assessment of the proportionality of the measure. In EU law, the scope of the right to private life is not clearly defined. The CJEU has not directly addressed a company's potential right to private life or its right to protect the private life of its employees in competition cases.

In *CNOP* the Court states that "the protection of private life provided for in Article 8 ECHR must be respected and the protection of home is extended to the premises of commercial companies"¹⁹⁴. In *Almamet*, while assessing the admissibility of cartel evidence, the Court stated that procedures set out to protect the fundamental rights, in particular the right to a private life and home, are essential procedural requirements and any cartel participant may be sure that evidence obtained in breach of such procedures are inadmissible. In its wording, the Court refers to fundamental rights of an interested person, but later states that where the abovementioned procedures are not respected, the cartel participants are able to rely on the inadmissibility of evidence.¹⁹⁵ Cartel participants, for their part, are undertakings.

No conclusions may be drawn from these two references, as the concept of private life is addressed in both cases together with the right to home. Furthermore, *Almamet* addresses the importance of compliance with the lawful procedure and does not assess a potential violation of a fundamental right, *per se*. The right to private life is, nevertheless, raised in both cases in the context of companies. On the contrary, the CJEU has also dismissed appeals

¹⁹⁴ T-23/09, *Conseil national de l'Ordre des pharmaciens (CNOP) v. Commission*, EU:T:2010:452, para 40.

¹⁹⁵ *Almamet v. Commission*, para 39–40.

concerning interference with private life as unfounded. Both courts considered in *Evonik Degussa* that documents revealing participation in a cartel are not protected under concept of private life.¹⁹⁶

To conclude, the Court has not directly assessed the applicability of the right to private life to companies under competition authority inspection. As for now, the question might have been of secondary importance, as the CJEU has, as mentioned above, applied Articles 8 ECHR and 7 CFR in their entirety. The few cases on the topic are best suited to highlight the liberties the CJEU takes in its terminology related to right to private life.

3.4 Companies right to privacy under competition authority inspections in Finland

3.4.1 Right to privacy as fundamental right and human right

In Finland, the right to privacy is protected under Article 8 ECHR and Section 10 FC. Section 10 FC provides protection to private life, honour and the sanctity of the home as well as to the secrecy of correspondence and other confidential communications under the title “right to private life”. Section 10 FC rights were introduced as fundamental rights in Finnish legislation upon reform of fundamental rights in 1995¹⁹⁷. In Finland, fundamental rights are constructed as rights of natural persons¹⁹⁸, and legal persons enjoy only indirect protection¹⁹⁹. Certain fundamental rights are extended to legal persons as well, where the purpose of the provision so requires²⁰⁰. Pursuant to preparatory works, Section 10 FC protects the private life of an individual against arbitrary intrusions of the state and other third parties²⁰¹ - which by its formulation resembles both the meaning of Article 8 ECHR and the early general principle of EU law. However, the scope of the right is more limited.

3.4.2 Right to respect to home: limited protection of business premises

The scope of fundamental rights is mainly defined by the Constitutional Law Committee (“CLC”) in its statements²⁰². The CLC has repeatedly stated that as a fundamental right, the right to respect for home is strictly limited to spaces of permanent habitation and does not

¹⁹⁶ T-341/12, *Evonik Degussa v Commission*, EU:T:2015:51, paras 123–127 and C-162/15, *Evonik Degussa v Commission*, EU:C:2017:205, paras 117–121.

¹⁹⁷ At the time, they were introduced in Section 8 Hallitusmuoto (94/1919) (“Former Constitution”). As Section 8 was transferred unaltered to Section 10 of the new Constitution, I will refer to Section 10 for sake of cohesion in the text.

¹⁹⁸ HE 309/1993: Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta, p. 5 and 23; Neuvonen 2014, p. 33.

¹⁹⁹ HE 309/1993, p. 23.

²⁰⁰ *Ibid*, p.23.

²⁰¹ HE 309/1993, p. 53.

²⁰² Neuvonen and Rautiainen 2015 (I), p.41.

cover business premises that are not used for such purposes²⁰³. Business premises and storage spaces may enjoy protection under the right to respect for home, but only in so far as they include spaces where individuals are living on a permanent basis²⁰⁴. Pursuant to CLC, these spaces enjoy a more limited protection²⁰⁵. Public spaces, such as offices and business premises are protected under Chapter 24 Sections 3 and 4 of the Criminal Code, but this covers only illegal intrusions carried out by individuals.

The CLC has explicitly stated that inspections of business premises, when carried out under Section 35 Competition Act, do not take place in the sphere of right to respect for home²⁰⁶. The last time the Competition Act was reformed, professor Răman pointed out in his statement, with a reference to *Société Colas*, that ECtHR has broadened the concept of home to cover also business premises. However, he did not elaborate on the possible implications of this, as that was beyond the assignment given to him.²⁰⁷ Thereby, Section 10 FC does not provide protection for undertakings under authority inspections unless the homes of employees are inspected. This entails that when Section 10 FC is applied or referred to in the context of inspections at business premises, it does not provide protection equivalent of Article 8 ECHR.

As regards Article 8 ECHR, the Market Court and the Supreme Administrative Court have applied it in *Asfalttiliitto and others (MAO)* and *Asfalttiliitto and others (KHO)*²⁰⁸, the so-called asphalt cartel case. Both courts considered the article applicable and carried out an assessment of the proportionality of the authority measure. The courts did not explicitly state that company premises and/or correspondence is protected under Article 8 ECHR, but considered the article to be applicable²⁰⁹. It may be concluded that the Supreme Administrative Court holds that companies enjoy at least a certain protection of their

²⁰³ PeVL 40/2010: Perustuslakivaliokunnan lausunto hallituksen esityksestä kilpailulaiksi, p. 4; PeVL 49/2005: Perustuslakivaliokunnan lausunto Hallituksen esityksestä laiksi lääkelain muuttamisesta, p. 3; PeVL 8/2006: Perustuslakivaliokunnan lausunto Hallituksen esityksestä Elintarviketurvallisuusviraston perustamisesta, p. 2; see also Hautamäki 2012 and Hautamäki 2011, p.88..

²⁰⁴ PeVL 40/2010, p. 4; PeVL 46/2001: Perustuslakivaliokunnan lausunto Hallituksen esityksestä maaseutuviraston perustamisesta, s. 3.

²⁰⁵ PeVL 40/2010, p. 4; PeVL 17/1998: Perustuslakivaliokunnan lausunto Hallituksen esityksestä laiksi rajavartiolaitoksesta, p. 4; PeVL 8/1994: Perustuslakivaliokunnan lausunto Hallituksen esityksestä telekuuntelua ja -valvontaa sekä teknistä tarkkailua koskevaksi lainsäädännöksi, p. 3–4, PeVL 16/2004: Perustuslakivaliokunnan lausunto Hallituksen esityksestä SOLAS-sopimuksen liitteen muutoksista, p. 5.

²⁰⁶ PeVL 40/2010, p. 4.

²⁰⁷ Răman 2008, p. 192. The Working Group on Competition Law 2010 had ordered an expert statement from Răman on the topic of employees' right to privacy under competition authority inspections.

²⁰⁸ MAO:441/07, *Asfalttiliitto ja muut (MAO)*, and KHO:2009:83, *Asfalttiliitto ja muut (KHO)*, 29.9.2009.

²⁰⁹ *Ibid.*

business premises. The Governmental Proposal for Competition Act states that competition authority inspection operate in a domain protected by Article 8 ECHR²¹⁰.

3.4.3 Right to legal professional privilege – but not under Article 8 ECHR or Section 10 FC

The CLC has not clarified if undertakings may enjoy protection of their confidential communications under Section 10 FC. However, in preparatory works it has been stated that Section 10 FC protects an individual's right to confidential communication²¹¹ and the right to confidential communication pursuant to Section 10 FC is a right of citizens²¹². Thereby, for the purposes of this thesis, it is possible to conclude that companies as legal persons do not enjoy the protection of their communications in a way that would be relevant in competition authority inspections. The personal communications of individual employees are naturally protected.

Communication between a lawyer and client company is protected under ordinary law and the definition is developed in the context of rights of defence. Section 38(3) of Competition Act provides that undertakings are not under the obligation to hand to the FCCA documents that contain confidential communication between an external lawyer and client company. The Governmental Proposal for Competition Act further provides that this communication must be related to the matter under investigation. Moreover, the communication must be of such nature that it may be relevant for the rights of defence of the company. The Government Proposal states that this provision is informative in nature and corresponds to the general principle of LPP developed by the CJEU and is applicable in all competition authority inspections in Finland.²¹³ However, there are still certain differences.

Pursuant to *AM&S*, LPP is applicable to communications between a client and a lawyer that is a member of a bar association within the EU. In Finland, Section 13 Chapter 17 of Judicial Procedure provides that also certain other lawyers providing legal advice may produce communications protected by LPP. Pursuant to this section the prohibition to testify is applicable to attorneys and counsels²¹⁴. This has been confirmed by the Supreme Court in

²¹⁰ He 88/2010, p. 11.

²¹¹ HE 125/2003: Hallituksen esitys Eduskunnalle sähköisen viestinnän tietosuojalaiksi ja eräksi siihen liittyviksi laeiksi, p. 6. In this context, legal persons were only considered subjects of protection provided in secondary legislation.

²¹² HE 158/2007: Hallituksen esitys eduskunnalle laiksi sähköisen viestinnän tietosuojalain muuttamisesta, p. 3.

²¹³ HE 88/2010, p. 80.

²¹⁴ Formerly Section 23 Chapter 17 Code of Judicial Procedure.

2003 in *A*, in which the court limited the concept only to attorneys and legal counsels who provide assistance related to a trial²¹⁵. Later legal literature has proposed that also other lawyers providing legal advice could be subject to LPP²¹⁶, but the prevailing interpretation has not been challenged by a court. However, the requirement of bar membership is not provided by the Code of Judicial Procedure. If the EU definition would be introduced in Finland in this regard, only a very limited number of legal professionals would fall into the definition, as only approximately 10 per cent of Finnish lawyers are members of the bar²¹⁷. Nevertheless, the Government Proposal for Code of Judicial Procedure confirms that LPP is limited only to external lawyers within the meaning of CJEU case-law²¹⁸.

Secondly, also the situation regarding the material scope of LPP is less clear. The Supreme Court stated in 2003 that pursuant to the wording of Code of Judicial Procedure, LPP protects only documents related to the matter subject to trial, and it decided to interpret the law accordingly. The reform of Code of Judicial Procedure amended the provision concerning the prohibition to testify. It provides now that the prohibition to testify applies also to private and family secrets as well as business and professional secrets an attorney or an authorized counsel²¹⁹ has obtained when providing legal advice not related to litigation²²⁰. Pursuant to the Government Proposal, such information may include information of health or internal matters of a family, or information related to a business acquisition²²¹. It remains to be seen, to what extent this reform could broaden LPP protection in competition authority inspections – and if this would provide a more extensive definition of LPP. The Working Group Report suggests that this would not be the case, as it refers to the preparatory works of Competition Act as well as EU definition, and repeats the requirement that the information is related to rights of defence²²². Legal literature has not addressed this question. Ilveskero has addressed the repercussions of the Code of Judicial Procedure reform in an article, but only from the perspective of FCCA inspections in a law firm, a premises which enjoys enforced protection

²¹⁵ KKO 2003:119, *A*, 5 December 2003.

²¹⁶ Kainulainen 2007, p. 877; Statement of professor Petri Kuoppamäki of 15 May 2017 on reform of Competition Act, p. 2.

²¹⁷ www.asianajajaliitto.fi/asianajajaliitto/liitto_lyhyesti.

²¹⁸ HE 46/2014: Hallituksen esitys eduskunnalle oikeudenkäymiskaaren 17 luvun ja siihen liittyvän todistelua yleisissä tuomioistuimissa koskevan lainsäädännön uudistamiseksi, p. 70.

²¹⁹ In Finnish: "asianajaja tai luvan saaneista oikeudenkäyntiavustajista annetussa laissa tarkoitettu oikeudenkäyntiavustaja taikka valtion oikeusaputoimistoista annetussa laissa tarkoitettu julkinen oikeusavustaja"

²²⁰ Section 13 Chapter 17 Code of Judicial Procedure.

²²¹ HE 46/2014, p. 69.

²²² Working Group Report, p. 33–35.

under the ECHR and the inspection of which, according to Ilveskero, should be subject to authorization by the Market Court under Section 36 Competition Act in any event²²³.

In *A*, the Supreme Court stated, after reference to *Campbell* and acknowledging that the definition of legal privilege entails all legal communication, that the need for protection is highest where the material may be relevant for the rights of defence. Thereby materials not related to the matter under investigation enjoy a lesser protection. The court drew the conclusion reading Article 8(2) ECHR in conjunction with Article 6 ECHR. It is noteworthy that the ECtHR has highlighted the importance of LPP in the context of rights of defence but it has, similarly, stated that legal communication is protected under Article 8 ECHR and any limitations to the right should be interpreted narrowly. Moreover, any interference with such communication should be necessary and proportionate.

Under Finnish law, the concept of LPP is tied to rights of defence, yet the reform of Code of Judicial Procedure appears to broaden the concept also to certain other forms of legal advice. However, the definition is still provided in the Code of Judicial Procedure, which is a law governing trials. LPP within the meaning of Article 8 ECHR is protected also as a part of communications. The ECtHR has not established an exhaustive definition of LPP communications in the context of companies that are not law firms. It is possible that also non-litigation related materials could fall within the definition. However, LPP communications under Article 8 ECHR are not inviolable but may be interfered with under criteria addressed in detail in Chapter 4 of this thesis. Thereby, the protection is indeed lower, as interpreted by the Supreme Court, but there is still protection that may be limited only pursuant to the criteria. From the perspective of Article 8 ECHR, classification as LPP information has one main consequence: the need to subject the copying and/or inspection of the document to judicial review.

3.4.4 Right to private life: focus on inspections

As already established above, the ECHR and EU law do not protect the private life of companies, as this right is limited to natural persons. It may, however, have relevance in the overall assessment. In Finland, the literary on this topic is scarce. The Government proposal on Competition Law admits that authorities do encounter material subject to right to private life, when they go through materials to identify documents relevant to the investigation²²⁴.

²²³ Ilveskero 2017, p. 242–243.

²²⁴ HE 88/2010, p. 35.

Råman points out that to establish the private nature of materials, the authorities have to assess the materials in question, whereby private information may be revealed. This amounts to limitation of the fundamental right.²²⁵ For the purposes of this thesis, it is not necessary to address the aspect of private life in more detail.

3.4.5 Section 10 FC and Article 8 ECHR: similarities and differences

The Government proposal on the reform of fundamental rights²²⁶ states that the term private life is an umbrella term that covers all aspects of the private sphere of an individual²²⁷. The proposal further notes that the term is used, among others, in Article 8 ECHR.²²⁸ In 2001, Viljanen concluded based on this formulation that the concept of private life in Section 10 FC corresponds to Article 8 ECHR, and thereby, interpretations of the ECtHR should be taken into account when applying Section 10 FC²²⁹. Furthermore, in 1996 he stated that as the ECtHR considers that also professional aspects of life may be protected under Article 8 ECHR, it is very natural that Section 10 rights are interpreted accordingly²³⁰. As established above, this reading has not been embraced by the CLC.

Saraviita, for his part, states that the scope and meaning of the right to private life was left open at the preparatory stage.²³¹ Thereby, it is not possible to say what is the genuine role of the ECHR in relation to the FC. Mahkonen criticised the drafters in 1997 for taking a focus on the right to private life and not opting for the more extensive concept of right to privacy, which according to Mahkonen, would have covered the rights set out in Article 8 ECHR. He considers the concept of private life is too narrow²³².

Section 10 FC may correspond to Article 8 ECHR to a certain extent, where the rights of an individual are in question. For companies, it does not grant equivalent protection. This feature was also identified by Råman, who stated that as the developing case-law of the ECtHR considers certain rights applicable to undertakings, there is, potentially, a reason for the CLC to take these developments into consideration – but that also the current approach has its own justification²³³. However, the CLC tends to apply exclusively Section 10 FC

²²⁵ Råman 2008, p. 196.

²²⁶ HE 309/1993

²²⁷ *Ibid*, p. 54.

²²⁸ *Ibid*, p. 54.

²²⁹ Viljanen 2001, p. 277 and 279.

²³⁰ Viljanen 1996, p. 802–803.

²³¹ Saraviita 2005, p.369.

²³² Mahkonen 1997, p. 48, 49 and 59.

²³³ Råman 2008, p. 194–195.

when assessing authority measures, whereby it is possible that Article 8 ECHR is not fully acknowledged upon drafting new legislation. It is also noteworthy upon referring to the statements of the CLC that they address a right more limited than that of Article 8 ECHR and do not amount to statements on companies right to privacy within the meaning of Article 8 ECHR.

To conclude, as Section 10 FC does not protect companies and company premises, CLC statements in that regard do not amount to an assessment if the rights under Article 8 ECHR are respected. The same may be said of Article 7 CFR, as that covers also business premises. Normally, national fundamental rights are expected to offer more extensive protection than human rights instruments²³⁴, but in the context of companies, this is not the case. In the next chapter, I will address the safeguards required for an interference with rights protected under Article 8 ECHR. As Section 10 FC protects only individuals, for the purposes of this thesis, it is not relevant to address it in later chapters.

4. Lawful inspection: how to safeguard an interference with the right to privacy

4.1 The ECHR interpretation of legitimate interference

4.1.1 Introduction to the limitation clause set out in Article 8(2) ECHR

As established above, authority inspections in company premises interfere with rights protected by Article 8 ECHR. This has been acknowledged by the EU through Article 7 CFR and as a general principle of law, and in Finland by the Supreme Administrative Court and in preparatory works. An interference with the right does not amount to a violation of the article. The second paragraph of Article 8 ECHR sets out the legitimate exceptions to the right protected under the first paragraph. When the requirements of the second paragraph are complied with, the interference is legitimate. Firstly, the measure needs to be *in accordance with the law* and secondly, it must pursue *one or more aims* prescribed by the paragraph and thirdly, the measure must be *necessary in a democratic society* to achieve these aims²³⁵. The Court has repeatedly pointed out that these exceptions are to be interpreted narrowly²³⁶.

²³⁴ Husa 2001, p. 47–48; Lavapuro 2010, p. 40.

²³⁵ The requirements are set out in Article 8(2) ECHR and formulated the following way in case law, for example in *Petri Sallinen and others v. Finland*, para 73; *Rozhkov v. Russia (No. 2)*, Application no. 38898/04, 31 January 2017, para 109; *Misan v. Russia*, Application no. 4261/04, 2 October 2014, para 53.

²³⁶ *Kalnénienė c. Belgique*, Requête no 40233/07, 31 janvier 2017, para 37; *Société Colas Est and others v. France*, para 44; *Klass and others v Germany*, Application no. 5029/71, 6 September 1978, para 42; *Van Rossem c. Belgique*, Requête no 41872/98, 9 décembre 2004, para 42.

4.1.2 What kind of law justifies an interference?

As established above, Article 8(2) ECHR requires that an interference is to be in accordance with the law. This entails that the interference has a basis in domestic law. As regards written laws, this means the law as interpreted by competent courts.²³⁷ The law must also be accessible to the person concerned.²³⁸ Moreover, the law needs to be "sufficiently clear", so the subject may understand under which circumstances and under which conditions public authorities are entitled to interfere with the rights protected.²³⁹ This means that the person concerned must be able to foresee the consequences of the law, either on their own or with appropriate legal advice.²⁴⁰ The law must also be of adequate quality, meaning that it must be compatible with the rule of law²⁴¹.

The first and second requirement are fulfilled by a national law that is published – which is obviously fulfilled by the Competition Act in Finland and the Regulation 1/2003 in the EU. The requirement of sufficient clarity entails that the law should provide the general framework for an inspection or a search, from the description of infringements to how authorities are entitled to investigate, and how subjects of investigations are to cooperate in these investigations. The fourth requirement is a minimum standard of a kind, meaning that the national law provides "some protection to the individual against arbitrary interference with Article 8 rights", and that this is also sufficiently clearly formulated in the legislation²⁴². In *Sallinen* the last requirement was not fulfilled in Finland, as national law did not specify in which circumstances privileged material could be subject to search and seizure²⁴³.

In Finland, the Supreme Administrative Court assessed in *Asfalttiliitto and others*²⁴⁴ the legal basis of the FCCA inspections. The Market Court had established that competition authority inspections have a basis in law, as this was provided, at the time, in the Act on Competition Restrictions²⁴⁵. The Supreme Administrative Court held that the Act on Competition Restrictions sets out accurately the areas in which the authority may carry out inspections as

²³⁷ *Robathin v. Austria*, para 40; *Société Colas Est and others v. France*, para 43; *Buck v. Germany*, para 37.

²³⁸ *Prezhdarovi c. Bulgaria*, Application no. 8429/05, 30 September 2014, para 43; *Robathin v. Austria*, para 40.

²³⁹ *Peev v. Bulgaria*, Application no. 64209/01, 26 July 2007, para 43.

²⁴⁰ *Prezhdarovi c. Bulgaria*, para 43; *Robathin v. Austria*, para 40.

²⁴¹ *Petri Sallinen and others v. Finland*, para 76.

²⁴² *Ibid*, paras 82 and 92.

²⁴³ *Ibid*, para 92.

²⁴⁴ *Asfalttiliitto ja muut (MAO)*

²⁴⁵ The statement of reasons of the Market Court in *Asfalttiliitto ja muut (MAO)*.

well as the materials it has the power to inspect²⁴⁶. Thereby, the legislation in force may be deemed to have sufficient level of clarity. However, at that time, there were no provisions governing documents protected by LPP. The courts may not have addressed the issue, as the applicant company did not claim this right would have been interfered with. In the Competition Act, the right to withhold materials protected by LPP is included. However, a definition of the scope of LPP is not provided.

4.1.3 What is a legitimate aim?

Pursuant to paragraph 2 of Article 8 ECHR, the inference must pursue a legitimate aim of national security, public safety or the economic well-being of the country and be for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Court has established in cases *Société Colas*, *Société Canal Plus*, *Delta Pekárny* and *Vinci* that inspections related to suspected competition infringements pursue the legitimate aim of the economic wellbeing of the country and that of the prevention of crime²⁴⁷.

4.1.4 What is necessary and proportionate in democratic society?

Pursuant to Article 8(2) ECHR, the interference must also be necessary in a democratic society. This entails that there must be a pressing social need for the interference and the measures taken must correspond to the aim pursued. In other words, the measure needs to be proportionate.²⁴⁸ Only the ECtHR may carry out the proportionality assessment in individual cases, but interpretations established in its case-law may be used as guidelines also nationally, as established above. Pursuant to the ECtHR, the authority must have relevant and sufficient reasons for the interference²⁴⁹, and choose the least intrusive means of interference²⁵⁰. An inspection or a search is justified only if the evidence may not be obtained with less intrusive means. To ensure the proportionality of the measure in each individual case, national legislation and practice must provide adequate and effective

²⁴⁶ *Asfalttiliitto ja muut (KHO)*, para 1008.

²⁴⁷ *Delta Pekárny A.S. c. République Tchèque*, para 81; *Société Canal Plus et Autres c. France*, para 53, *Vinci Construction et GTM Génie Civil et Services c. France*, para 52; *Société Colas Est and others v. France*, para 44.

²⁴⁸ *Rozhkov v. Russia (No. 2)*, para 116; *Amarandei et autres c. Roumanie*, Requête no1443/10, 26 avril 2016, para 218; *Buck v. Germany*, para 44.

²⁴⁹ *Rozhkov v. Russia (No. 2)*, para 118; *Vinci Construction et GTM Génie Civil et Services c. France*, para 65; *Keslassy c. France*, Requête no. 51578/99, 8 janvier 2002

²⁵⁰ *Cacuci and S.C. Vlrre & Cont PAD S.R.L. v. Romania*, Application no. 27153/07, 17 January 2017, para 91.

safeguards against abuse and arbitrariness²⁵¹. These safeguards, for their part, need to be effective and concrete and not theoretical and illusory²⁵². Furthermore, also individual circumstances of each case weigh in the assessment²⁵³.

In its case-law, the ECtHR has identified at least the following safeguards: prior judicial authorization or an authority decision that is subject to judicial review²⁵⁴, an inspection decision or a warrant of sufficient clarity²⁵⁵ that is drafted for the particular type of premises inspected²⁵⁶, the right to be present at the inspection or a search²⁵⁷, the obligation of confidentiality of the inspecting authorities²⁵⁸, the right to take only copies and not seize the originals²⁵⁹, the listing of items seized or inspected²⁶⁰, the right to prevent the authority from seizing correspondence protected under LPP or the right to have them returned²⁶¹, the right to have judicial review assessing if copied data falls in the scope of the search warrant or inspection decision²⁶² and the right to judicial review of the proportionality of the measures taken²⁶³. The list above is not definitive, and the ECtHR has not required that all the above safeguards should be available in all contracting states. However, it has put forward the requirement that an inspection or a search, insofar as it constitutes an interference with Article 8 ECHR, needs to be authorized by a judge²⁶⁴ or subjected to *a posteriori* judicial review²⁶⁵. This requirement is not dependent upon other safeguards available, but judicial authorization or review is necessary to ensure the proportionality of the interference. *A contrario*, the absence of this safeguard amounts to violation of Article 8 ECHR. Pursuant to the ECtHR, prior judicial authorization and *ex post facto* review are the most important

²⁵¹ *Société Colas Est and others v. France*, para 48; *Sorvisto v. Finland*, para 118.

²⁵² *Amarandei et autres c. Roumanie*, para 224; *Vinci Construction et GTM Génie Civil et Services c. France*, para 75.

²⁵³ *Rozhkov v. Russia (No. 2)*, para 118; *Misan v. Russia*, para 55; *Buck v. Germany*, para 45.

²⁵⁴ *Delta Pekárny A.S. c. République Tchèque*, Requête no 97/11, 2 octobre 2014, para 86.

²⁵⁵ *Lindstrand Partners Advokatbyrå Ab v. Sweden*, para 95; *Cacuci and S.C. Vlrra & Cont PAD S.R.L. v. Romania*, para 91; *Robathin v. Austria*, para 41.

²⁵⁶ *Rozhkov v. Russia (No. 2)*, para 118. *Buck v. Germany*, para 4.

²⁵⁷ *Cacuci and S.C. Vlrra & Cont PAD S.R.L. v. Romania*, para 98; *Delta Pekárny A.S. c. République Tchèque*, para 92.

²⁵⁸ *Delta Pekárny A.S. c. République Tchèque*, para 92.

²⁵⁹ *Ibid*, para. 92.

²⁶⁰ *Cacuci and S.C. Vlrra & Cont PAD S.R.L. v. Romania*, para 96.

²⁶¹ *Vinci Construction et GTM Génie Civil et Services c. France*, para 79.

²⁶² *Robathin v. Austria*, para 48.

²⁶³ *Delta Pekárny A.S. c. République Tchèque*, para 87.

²⁶⁴ After *Société Colas*, certain authors concluded that a prior justification would be an absolute prerequisite, a position the Court has clearly rejected later. For argumentation for this, see for example Weiss 2011, p. 194–195.

²⁶⁵ *Rozhkov v. Russia (No. 2)*, para 122.

safeguards to Article 8 ECHR rights, because the judicial authority may assess the necessity and proportionality of the authority measure in each individual case²⁶⁶.

The ECtHR has stated that in the absence of prior judicial authorization, it must be particularly vigilant²⁶⁷. The ECtHR has also established a similar requirement to national courts who carry out the *a posteriori* judicial review²⁶⁸. A too limited review amounts to violation of Article 8 ECHR²⁶⁹. A sufficient review must assess the legality of the measure, the proportionality of the measure and the manner which the operation is carried out, which entails ensuring that authorities act within the scope of the search warrant²⁷⁰. Moreover, parties subjected to inspections or searches must have access to adequate redress, where the measure is found to be excessive²⁷¹.

The following chapter analyzes the interpretations of the ECtHR in greater detail. I will start with the two often-addressed landmark cases and then analyze, how rules established in these cases have been interpreted by the ECtHR most recently. In this part, I will also address cases concerning individuals. The reason for this is that in these cases, the ECtHR has provided some specifications regarding the required safeguards. The ECtHR has established that natural persons may enjoy more extensive protection than legal persons, which will be taken into account in the assessment below. However, it is noteworthy that the ECtHR provides a wider margin concerning the scope of the interference but it has not stated that this would be the case regarding safeguards to ensure the necessity and proportionality of an interference.

4.2 Prior authorization and judicial review: developments in ECtHR case-law

4.2.1 Delta Pekárny: setting the standard for judicial review in competition cases

In *Delta Pekárny*²⁷² in 2014, the competition authority opened an investigation into suspected anti-competitive behavior of the applicant company and the same day, it carried

²⁶⁶ *Amarandei et autres c. Roumanie*, para 224.

²⁶⁷ *Prezhdarovi c. Bulgarie*, para 46; *Govedarski c. Bulgarie*, Requête no 34957/12, 16 février 2016, para 81; *Heino v. Finland*, Application no. 56720/09, 15 February 2011, para 40; *Isildak c. Turquie*, Requête no12863/02, 30 septembre 2008, para 51.

²⁶⁸ *Janssen Cilag S.A.S c. France*, Requête no 33931/12, Décision 21 mars 2017; *C.G. and Others v. Bulgarie*, Application no.1365/07, 24 April 2008, paras 42–49.

²⁶⁹ See, for example, *Modestou c. Grèce*, Requête no 51693/13, 16 mars 2017; *Zosymov v. Ukraine*; *Prezhdarovi c. Bulgarie*; *Vinci Construction et GTM Génie Civil et Services c. France*; *Robathin v. Austria*.

²⁷⁰ See, for instance, *Kalnèniènè c. Belgique*, para 37.

²⁷¹ *Rozhkov v. Russia (No. 2)*, para 122.

²⁷² *Delta Pekárny A.S. c. République Tchèque*.

out an inspection at the business premises of the company. Pursuant to national law, the competition authority had the right to carry out inspections as a part of an investigation and no authorization by a court was necessary. The authority had a wide margin of appreciation regarding the necessity and the scale of the inspection.²⁷³

The competition authority informed the company of the opening of the investigation by a notification, which was accompanied by authorization to carry out an inspection. The notification mentioned the object of the investigation on a very summary level and did not detail the facts the suspicions were based on. The names of the agents in charge of the inspection were included.²⁷⁴ The only document that provided precise information of the aim of the inspection was the record of the inspection that was handed at the end of the inspection²⁷⁵. The Court focused particularly to the fact that the authority had not informed the applicant company which documents it was concretely looking for as a part of the investigation²⁷⁶. The representatives of the company were present at the inspection and the competition authority had the right to take only copies of the documents and the agents were under the obligation of confidentiality²⁷⁷.

The Court restated the rule that the lack of judicial authorization for an inspection or an inspection decision subject to appeal may be balanced out by an *ex post facto* review of the legality and the necessity of the inspection²⁷⁸. In this case, the Court concluded that the *ex post facto* review was not sufficient. Pursuant to the Court, it was not sufficient that the court assessed if the agents carrying out the inspection acted within the competences provided for them by the law. The review was too theoretical and did not focus on the factual elements of the inspection. The national court did not examine the facts that led the competition authority to carry out the inspection and consequently, there was no judicial review of the opening of the inspection or the length or scope of the inspection.²⁷⁹

The Court also challenged the view of the national court according to which the inspection was justified the moment the authority had suspicions that certain market behavior was the result of a contract between competitors and that proof of this contract could only be obtained

²⁷³ *Ibid*, paras 84, 86 and 91.

²⁷⁴ *Ibid*, para 85.

²⁷⁵ *Ibid*, para 86.

²⁷⁶ *Ibid*, para 88.

²⁷⁷ *Ibid*, paras 7 and 92.

²⁷⁸ *Ibid*, para 87.

²⁷⁹ *Ibid*, para 91.

through an inspection. Pursuant to the Court, this presumption robbed the applicant company from the possibility to seek for compensation if the inspection would have been considered irregular and a compensation would only have been accessible via appeal to a higher court. Pursuant to the Court, this did not amount to an assessment of the necessity of the inspection.²⁸⁰ The Court concluded that the absence of judicial authorization combined with the lack of *ex post facto* control of necessity of the inspections meant that the applicant company did not have sufficient safeguards and the measure was not proportional to the aim.

In the case, the ECtHR did not stipulate if the national competition authorities took measures that would be contrary to Article 8 ECHR but it focused on the availability of efficient judicial review – which has become a recurring subject to assessment especially in the past years. Here, it put forward also the proposition that inspection decision subject to judicial review would amount to equal safeguard of a prior judicial authorization. It is, however, not clear, if also the measures taken during the inspection would be subject to appeal in this context or just the decision, which is the case in the EU. However, in other cases the ECtHR has required that also the measures taken should be subjected to review.

4.2.2 Vinci: judicial review of the nature of suspected LPP documents

In *Vinci*²⁸¹ in 2015, the ECtHR assessed if the national court reviewed in an adequate way the nature of documents allegedly containing information protected by LPP. The French legislation in force provided an *ex post facto* judicial review of inspection decision and measures taken during the inspection, including the assessment of alleged privileged nature of documents.

In *Vinci*, the authorities copied a great number of documents and entire electronic mailboxes of certain employees of the inspected companies. The material included also documents protected by LPP²⁸². The Court considered that the documents taken by the authorities were identified and listed in a sufficient manner, when the name, size, origin and digital imprint were recorded and this listing was provided for the inspected company with the copies of the seized documents²⁸³. During the inspection, the applicants had not had the possibility to know which documents were seized or express their view of the nature of the documents.

²⁸⁰ *Ibid*, para 91 in fin.

²⁸¹ *Vinci Construction et GTM Génie Civil et Services c. France*.

²⁸² *Ibid*, para 69 and 77.

²⁸³ *Ibid*, para 76.

According to the Court, as the applicants could not prevent the seizure of documents protected by LPP, they should be able to challenge the seizure of such documents *ex post facto*²⁸⁴.

In the case at hand, French law provided the possibility to make an appeal to have the documents returned or destroyed effectively, including the electronic copies of the documents. Pursuant to the Court, where the judge who carries out the review has been informed of reasoned allegations that seized documents, which have been identified, do either not have link with the inspection or are protected by LPP, it is for the judge to carry out a concrete proportionality assessment and if necessary, order the return of such documents. In the case at hand, the Court considered that it is not sufficient if such review only assesses the regularity of the inspection on a more general level and not carry out a concrete assessment.²⁸⁵

What is noteworthy in this case is that the Court stated that where the company subjected to inspection cannot prevent the seizure of documents containing, in the view of the company, information protected by LPP, the company under inspection should be able to have the nature of the documents assessed *ex post facto* in a concrete and effective way²⁸⁶. In this case, pursuant to the formulation of the Court, such procedure was provided by national law²⁸⁷. In the case at hand, such assessment was carried out by the national court. However, it is not possible to conclude, if the national court should be the first instance to carry out the assessment of the nature of the documents or if this could be carried out by another instance. However, the Court has repeatedly held that this kind of communication enjoys enforced protection under the ECHR and that the discretion of authorities should be subjected to judicial review where it has an impact of the rights of the natural or legal persons subjected to inspection. Thereby, judicial review must be available at least in the cases where the companies subjected to inspection do not agree with the outcome of the alternative procedure to establish the nature of suspected LPP documents.

²⁸⁴ *Ibid*, paras 77 and 78.

²⁸⁵ *Vinci Construction et GTM Génie Civil et Services c. France*, paras 76–81.

²⁸⁶ *Ibid*, para. 78.

²⁸⁷ *Ibid*, para. 78 en fin.

4.2.3 Zosymov: obligation to have all interferences reviewed

Zosymov in 2016 concerned a search and long-term seizure of computer equipment, data storage devices and other possessions, which took place in the context of a criminal investigation into a suspected breach of copyright²⁸⁸. In this case, the Court found a violation of Article 8 ECHR, as national law did not provide sufficient safeguards against arbitrariness and the judicial review was not sufficient.²⁸⁹

The applicant in the case was a natural person, but the searches were carried out in non-residential premises of the office, car and garage of the applicant²⁹⁰. The search amounted to an interference with the right to respect for home within the meaning of a non-domestic premises²⁹¹. As the inspected premises were business premises, the case may give insights to questions concerning undertakings as well, even if the subject of the rights is an individual²⁹². Furthermore, the applicant was not a suspect in the criminal case under investigation, whereby the inspection did not have any repercussions in that regard – which sets it apart from most cases concerning natural persons. The interference with Article 8 ECHR did not have an impact on their rights of defense, for example, but was problematic only from the perspective of Article 8 ECHR. It must be noted, however, that it was not clear at the time of the inspection if the applicant would be a suspect at some later point.

The search and seizure was carried out by police officers without a prior judicial authorization. The applicant received a “deed of inspection and seizure”, which did not state the legal basis of the inspection or the limits of the powers of the inspecting officers. Furthermore, the access to judicial review was limited. A complaint regarding the lawfulness of the inspection could only be brought in the context of the criminal trial initiated after the inspection, and in the case at hand, the case had been stagnant for several years and the applicant was not given an official status in the process, as he was not a suspect. The ECtHR stated that it is not sufficient if the subject of an inspection may appeal the inspection in the context of a later trial, the initiation of which is subject to the discretion of the authorities. If the authority would not initiate a trial, there was no access to judicial review. The Court

²⁸⁸ *Zosymov v. Ukraine*, Application no. 4322/06, 7 July 2016, paras 6–12.

²⁸⁹ *Ibid*, paras 61 and 62.

²⁹⁰ *Ibid*, para 59.

²⁹¹ *Ibid*, para 63.

²⁹² Rules developed regarding individuals have been later found to be applicable also to legal persons, as established above.

concluded that a limitation of this kind is incompatible with Article 8 ECHR.²⁹³

In the case, the Court particularly emphasized the access to judicial review. It formulated that all measures affecting human rights protected under Article 8 ECHR must be "subject to some form of adversarial proceedings before an independent body competent to review in timely fashion the reasons for the decision and the relevant evidence"²⁹⁴. In the case, it was not sufficient that these questions could be addressed in a later trial, when the initiation of the trial is subject to discretion of authorities. In other words, the right to judicial review of a search measure may not be dependent upon the authority initiating a further trial after the inspection or search. Either a prior judicial authorization or a judicial review of at least the justification of the search or inspection is necessary in all situations.

It must be pointed out that in the case at hand, the authority measures were *Kafkaesque* at the worst: the seizure of belongings continued for several years and the applicant did not get a response regarding his official status in the investigation for years. However, the requirement to have access to judicial review irrespective of a later trial was not dependent upon the level of arbitrariness involved but it was put forward as a necessary safeguard to ensure the proportionality and necessity of any interference. Safeguards are not relevant only where the authority acts in an arbitrary way, but they should be in place to prevent and redress situations where this happens – whether it is a structural problem or an individual event. Thereby, the additional clarification that access to judicial review should not depend upon the possibility of a later trial, could be applicable also to situations where the inspection is carried out in the business premises of a legal person. In any case, the requirement of access to judicial review was, once again, repeated.

4.2.4 Modestou: scope and timing of judicial review

The case *Modestou* (2017) concerned an inspection carried out in the domestic and business premises of the applicant, who is a natural person. The inspection was a part of a preliminary investigation into a suspected criminal offence, including the establishment of criminal organization.²⁹⁵ In this case, the Court found a violation of Article 8 ECHR, as the *ex post*

²⁹³ *Ibid*, para 61.

²⁹⁴ *Ibid*, para 60.

²⁹⁵ *Modestou c. Grèce*, para 7.

facto judicial review was not adequate. The case has been requested to be referred to the Grand Chamber.

In *Modestou*, the inspection was not ordered by a national court but by a prosecutor of the court of appeal.²⁹⁶ The inspection order was drafted in general terms: it stated as its aim to verify if criminal offences have taken place, namely that of establishment of a criminal organization by certain named individuals and people linked to them. This encouraged the investigators to seize all items and documents that, in their view, have a link to the matter under investigation.²⁹⁷ The Court noted that the authorization did not contain information of the investigation or of the items and documents to be seized, which granted extensive powers to the inspectors. Furthermore, the authorization did not include the names of the persons under inspection.²⁹⁸ Consequently, the inspectors seized two computers and hundreds of documents, and it was not clear if all the seized items and documents were related to the ongoing investigation.²⁹⁹ The applicant was also not present during the inspection.³⁰⁰

Pursuant to the Court, the abovementioned short-comings put an additional stress on the *ex post facto* judicial review. This review did not fulfill the standards set by the Court. The applicant had made an appeal to the national court of appeal, and the court delivered a decision over two years after the investigation. Furthermore, the national court focused on assessing if it is possible to order an inspection at the preliminary stage of an investigation. The Court stated that the national authorities failed to justify the search with relevant and sufficient grounds.³⁰¹ Consequently, the Court established a violation of Article 8 ECHR.³⁰²

The ECtHR has not previously stated what is an adequate – or inadequate – timeframe for the *ex post facto* judicial review, not in the context of natural persons and their domestic premises nor in the context of legal persons and their business premises. In this case, the ECtHR explicitly mentioned the lengthy waiting period as a contributing factor to the finding of a violation. Obviously, there were other serious short-comings in the procedure, namely the quality of the warrant and the absence of the applicant during the inspection, which is a big default. However, even if the Court did not establish, per se, that two years is too long a

²⁹⁶ *Ibid*, para 50.

²⁹⁷ *Ibid*, para 46.

²⁹⁸ *Ibid*, para 46.

²⁹⁹ *Ibid*, para 52.

³⁰⁰ *Ibid*, para 51.

³⁰¹ *Ibid*, para 52.

³⁰² *Ibid*, para 53.

time to wait for judicial review, the fact that the Court brought it to focus is not irrelevant. The ECtHR has established that the review should be effective, whereby it is likely that a belated review is not deemed effective. The case obviously concerned the rights of natural persons, and interferences which those rights are considered more serious by the Court. However, the Court has never held that the quality of safeguards would depend upon the subject of the inspection or search being a natural or legal person. Where the subject is a legal person, the authorities may take more extensive measures but the proportionality of these measures must, nevertheless, be ensured. A judicial authorization or judicial review that is effective, is a requirement applicable to all persons. It is possible that it should also be available in a reasonable timeframe.

4.2.5 Janssen Cilag S.A.S: sufficient judicial review of LPP documents

The case *Janssen Cilag*³⁰³ in 2017 concerned a competition authority inspection in France. The ECtHR found the case manifestly ill-founded, but in its assessment, it further clarified some of the interpretations made in *Vinci*. In the case at hand, the ECtHR held that company's rights under Article 8 ECHR were not violated, as the company under inspection had the possibility to have the suspected confidential nature of documents copied by the authority reviewed by the national court of appeal.³⁰⁴

The Court stated that in the case at hand, contrary to *Vinci*, the rights under Article 8 ECHR were effectively protected. Firstly, it stated that the rights are protected where the national judge carries out a sufficient proportionality assessment by assessing the privileged nature of the suspected documents. Here the applicant had, however, failed to identify such documents.³⁰⁵ Due to this, it was not necessary for the national court to carry out the review. The legal framework was deemed sufficient and the ECtHR considered that the national court would, where questions regarding the nature of the documents had been raised, assessed the nature of such documents.

In this case, the Court stated that the assessment of the suspected privileged nature of the documents under inspection constitutes a part of the proportionality control carried out by national judge. The Court did not state that a judicial authority should carry out a potential initial assessment, but that the possibility to subject the nature of the documents to court assessment is part of the obligatory judicial review. However, as the assessment was

³⁰³ *Janssen Cilag S.A.S c. France*.

³⁰⁴ *Ibid*, paras 3–6.

³⁰⁵ *Ibid*, paras 22–23.

dedicated to a national court, the procedure was fully in line with requirements of Article 8 ECHR.

4.2.6 Conclusions on safeguards

In its recent case-law, the Court has further highlighted the need to have all interferences with Article 8 ECHR rights subjected to judicial review, at least regarding their necessity. This has been brought up in cases concerning both legal persons and natural persons. The Court has set efficient judicial review as a prerequisite for the legitimacy of an inspection or search and seizure. There have not been any cases in which the Court would have deviated from its stance in this regard. This was very clearly formulated in *Zosymov*.

Furthermore, it has added the requirement of *timeliness*, which in *Modestou* was not fulfilled, when the review was to take place two years after the inspection. The case concerned the inspection of both home and business premises, and concerned criminal charges against an individual, whereby the need for protection could be higher. However, the ECtHR has also established that the margin of appreciation of states, which is wider regarding legal persons, should be used in good faith and sound manner. Moreover, this margin of appreciation applies to the scope of an interference, and not the safeguards thereof. The safeguards are at place to ensure that the interference is not greater than is necessary. Thereby, even if the timeframe set out in *Modestou* cannot be directly extended to all cases and to undertakings as well, the timeliness of the review must not be irrelevant regarding companies. It is also difficult to establish that a belated review would amount to an effective safeguard.

What is more, in *Zosymov*, again in the context of a natural person and criminal investigation but with formulation addressing *all interferences*, the Court concluded that judicial review should not be subject to the discretion of authorities and a potential later trial. It is not possible to draw a straight-forward conclusion that this would be required in all circumstances. In the least, the requirement to have the basis and scope of the inspection reviewed in all cases is applicable to, well, *all cases*, by the formulation of the Court.

What is noteworthy is that safeguards for an inspection must be in place to secure the respect for the rights set out in Article 8 ECHR. It is not decisive if a possible irregularity has repercussions in a later trial. The ECtHR has never tied the requirement of judicial review to a risk of a later sanction. An interference takes place even if the holder of a right is not later charged with any kind of offence or sanctioned in an administrative procedure. Where the interference with Article 8 ECHR has an impact on rights of defense, this contributes in

the overall assessment. This is, however, only a part of the overall assessment. The safeguards are in place to protect the rights provided by Article 8 ECHR. A well-established safeguard is a prior or *a posteriori* judicial review of the interfering measure. This should be secured to all holders of rights, be they natural or legal persons.

Similarly, the Court holds that documents containing LPP need to be protected *effectively*. In the cases reviewed, it was a national judge who carried out the assessment of their nature. When this was done thoroughly, Article 8 ECHR was respected. However, it is not possible to conclude that this assessment should be carried out by a court as a first instance, as the ECtHR has not addressed the question in the context of other procedures than a court procedure. In *Janssen Cilag* the ECtHR labelled this assessment as a part of the overall proportionality assessment carried out by a court. Thereby, it is possible that only the possibility to subject a decision of a different authority to judicial review would be sufficient.

Anderson has concluded that the ECtHR provides vast inspection rights regarding companies, as it does not require a prior judicial authorization and considers acceptable the copying of vast amounts of material as well as continued inspections at authority premises. However, to balance this wide margin of appreciation, the ECtHR does require an *ex post ante* judicial review.³⁰⁶ Andersson has described this as an absolute requirement³⁰⁷. In a way, the ECtHR empowers national courts to ensure the enforcement of human rights norms. This approach is not inherent in the legal systems of all contracting parties, some of which prefer to carry out the assessment upon drafting legislation. By highlighting the need of access to judicial review in all interferences, the ECtHR also highlights the importance of right to privacy.

Anderson furthermore argues that pursuant to the ECtHR, *a court* should order a restitution of documents outside the scope of inspection decision or protected by LPP³⁰⁸, a conclusion which is drawn also by De Jong and Wesseling³⁰⁹. This has, however, been only stated in cases where the national law designates the court as the instance to assess the nature of suspected privileged documents and the instance which takes decisions regarding those documents. The requirement of court assessment could be implied, as the nature of the documents is assessed in the context of the assessment of the regularity of the inspection,

³⁰⁶ Anderson 2017, p. 426.

³⁰⁷ Andersson 2014, p. 139.

³⁰⁸ *Ibid*, p. 426.

³⁰⁹ De Jong and Wesseling 2016, p. 331

but it is not evident if this may be only done by a court. It is possible that an alternative mechanism would serve the same purpose.

4.3 Safeguards in EU

4.3.1 Judicial review: legality of decision v. protection of fundamental rights

In *Deutsche Bahn*, the General Court identified five categories of safeguards provided by EU law to companies under Commission inspections. Those will be presented here in a cursory way to establish the framework, but due to the scope of the work, only judicial review will be addressed in detail.

The first and very central safeguard against arbitrary measures is the inspection decision. It sets the limits to the inspection rights of the Commission by stating the subject matter, purpose and scope of the inspection. All the documents inspected should be related to the subject matter of the inspection³¹⁰. However, the investigation is at preliminary stage at this point, which means that the Commission is not required to provide precise legal analysis of the infringements, estimate the timeframe of the infringements or even define precisely the relevant market³¹¹.

Second, certain documents fall outside the scope of inspection by their nature. The Court has established that undertakings do not need to provide documents of non-business nature and those protected under LPP. Moreover, oral explanations are protected, which means that undertakings are not under the obligation to answer questions in a way that would amount to self-incrimination. The effectiveness of the three first safeguards may only be secured by *a posteriori* assessment. Under the legislation in force, the measures taken during an inspection may only be appealed in the context of the final decision.³¹²

The third safeguard concerns, similarly, documents. The Commission is not entitled to carry out inspection by force, which means that undertakings may refrain from handing the Commission the document requested. This carries the risk of facing a penalty payment.³¹³ Fourth and fifth safeguard concern judicial supervision. The national courts maintain the

³¹⁰ T-289/11, *Deutsche Bahn and others v Commission*, EU:T:2013:404, paras 79–84, para 31; *Roquette Frères*, paras 44, 45, 47 and 48.

³¹¹ C-37/13, *Nexans and Nexans France v Commission*, EU:C:2014:2030, paras 35 and 36.

³¹² *Deutsche Bahn and others v. Commission (GC)*, paras 79–84.

³¹³ *Ibid*, paras 85–90.

right to supervise any coercive measures taken by the Commission. The undertaking may also request the General Court to review the regularity of the inspection decision.³¹⁴

In *Deutsche Bahn*, the CJEU assessed if the EU legislation and practice regarding the authorization of an inspection fulfil the requirements set out by Article 8 ECHR. With reference to *Société Colas* and settled case-law of the ECtHR, the CJEU concluded that the absence of prior judicial authorization may be balanced by *a posteriori* judicial review³¹⁵. This is also the current interpretation of the ECtHR, whereby no prior judicial authorization is necessary. However, as regards the *a posteriori* review, the CJEU delivered an interpretation that is not fully in line with the judgements of the ECtHR. It will be addressed below.

The national courts, however, carry out a limited review before an inspection takes place within their jurisdiction. The Commission has the power to take inspection decisions independently, but it may only take coercive measures at the territory of Member State in compliance with the national legislation. Thereby, if national legislation requires a prior judicial authorization to enter premises of a company without the permission of the company in question, the Commission must obtain one.³¹⁶

For the part of the *ex post facto* judicial review, the CJEU further assessed in *Deutsche Bahn* that this requirement is fulfilled in the EU, as the decisions taken by the Commission are subject to review by the European Union courts and upon such review, the Courts carry out a review of the law and the facts³¹⁷. This does not, however, fully correspond to the requirements set out by the ECtHR. The company under inspection may appeal the content of the inspection decision, but the measures taken may be appealed only after the final decision issued by the Commission.

Where the inspection decision is appealed and annulled under Article 263 TFEU, the documents and other evidence obtained under the illegal inspection cannot be used as a basis for a decision on the suspected infringement.³¹⁸ The General Court formulated in *Almamet* that evidence is inadmissible when it is obtained in disregard of the relevant regulations governing the inspection in question, even if there is no claim of harm caused by such

³¹⁴ *Ibid*, paras 91–99.

³¹⁵ *Deutsche Bahn v. Commission (ECJ)*, paras 22, 26 and 32.

³¹⁶ Article 20(6–8) Regulation 1/2003.

³¹⁷ *Deutsche Bahn v. Commission (ECJ)*, paras 33–34.

³¹⁸ *Almamet v. Commission*, para 31.

measures.³¹⁹ The aim is to prevent the Commission from taking so called fishing expeditions³²⁰.

Curiously, the General Court formulated in *Almamet* that any cartel participant has the right to appeal to the General Court a suspected infringement of safeguards protecting fundamental rights, which include, in particular, the right to respect for home and private life³²¹. Pursuant to the Court, this means that if the Commission does not follow the procedure set out in Regulation 1/2003 but for instance seizes documents outside the scope of the inspection decision, any cartel participant may subject these measures to the review of the CJEU.³²² This applies exclusively to situations where the Commission acts in breach of the relevant regulations³²³. However, the Court did not clarify which right an irregularity would infringe. In the event the inspection does not take place in the premises of the injured party, the right to respect for home could hardly come into question and the right to private life is also limited to individuals.

In *Nexans*, the General Court confirmed that the way the Commission conducts an inspection may be appealed only when seeking annulment of the final decision regarding the suspected competition infringement³²⁴. This entails that only inspections leading to final decisions may be appealed. Furthermore, this means in practice is that the delay between the measures and the access to review may be several years³²⁵. However, *Nexans* proposes an alternative control mechanism for undertakings. Where the companies do not accept that certain documents fall in the scope of the decision, the companies may subject Commission measures to a more timely review by refusing to produce the requested documents. In that case, the Commission takes a decision ordering a fine or a periodic penalty payment and the company may challenge that decision in General Court. The Court then assesses if the documents enjoy protection under the fundamental rights of right to privacy and rights of defence³²⁶.

³¹⁹ *Ibid*, para 40.

³²⁰ Leghezza 2013, p. 216.

³²¹ *Almamet v. Commission*, para 39 and 42.

³²² *Ibid*, para 40, 42 and 46.

³²³ *Ibid*, para 41.

³²⁴ *Nexans France and Nexans v Commission*, para 132; *Limburgse Vinyl Maatschappij and Others v. Commission*, para 413.

³²⁵ Zhou 2016, p.6 refers to calculations carried out by Bruegel think tank according to which the average duration between the start of dawn raids and the closure of the investigation was 3 years 8 months. This calculation was based on 127 cartel investigations of the Commission between years 1996 and 2014.

³²⁶ *Nexans France and Nexans v Commission*, paras 121–132.

In *Deutsche Bahn*, the applicant company appealed three inspection decisions. The ECJ annulled two inspection decisions that were based on the first inspection, where the Commission authorities knowingly seized documents falling outside the scope of the inspection decision. The Court condemned measures taken by the Commission during the first inspection, but this only had an impact on the two later inspection decisions.³²⁷ Thereby, the irregularities that took place during the first inspection were not assessed in the context of the first inspection. In this way, the applicant company did not have the proportionality of the interference with its rights protected under Article 8 ECHR – or Article 7 CFR – assessed but only the legality of the later Commission decisions was under review.

The CJEU focuses on ensuring that decisions taken by the Commission are in compliance with the law³²⁸. This means that it has, mainly, an interest in reviewing the legality of the inspection decision. Measures taken during the inspection are subject to review only if they lead to another decision, which would be the final decision on the suspected infringement. Thereby, the CJEU focuses on assessing that the decisions are taken in compliance with EU law. What the CJEU does not do is ensure the inviolability of the business premises of companies situated in the EU as a right in its own. If this would be the case, the companies would be able to appeal also the measures taken under the inspection irrespective of the issuance of the potential final decision. Andersson argues that due to this, the EU does not provide effective protection of human rights³²⁹.

As established above, the ECtHR has set out a general requirement of *ex post facto* judicial review as a safeguard for Article 8 ECHR. From that perspective, it is not sufficient that inspection measures are assessed only if there is a decision imposing fines. In the absence of such decision, the companies do not have access to judicial review to ensure that the interference with their right to respect to home and correspondence is not excessive in scale. However, the EU is not under a legal obligation to alter its practice to correspond with that of the ECtHR. Article 52(3) CFR may, pursuant to certain interpretations, give a legal basis to grant at least equivalent protection. However, nothing obliges the EU to comply with the ECtHR standard.

³²⁷ *Deutsche Bahn v. Commission*, para 65–71.

³²⁸ Andersson 2017, p. 439.

³²⁹ Andersson 2014, p. 140.

4.3.2 LPP protection: adequate protection of certain documents

The procedure to prevent communications between an external lawyer and a client company from being inspected is, however, at the level prescribed by the ECtHR. The EU scrutiny is even at a higher level, as it enables companies to challenge the nature of the documents at any point of the inspection. Where the company under inspection claims protection under LPP, there are two ways to assess the privileged nature of the document. Firstly, the Commission may take a cursory look of the document in question to confirm the claim put forward by the company. This cursory look may cover "the general layout, heading, title or other superficial features of the document".³³⁰

Secondly, the company may refuse even a cursory look, if it suspects that it would not suffice to prove the privileged nature of the document or if there is a risk that it would reveal privileged information. In that case, the Commission puts the document in question in a sealed envelope and takes it to the Commission premises in Brussels. After this, the Commission adopts a formal decision requiring the company to produce the document in question. This enables the company to challenge the decision at the General Court, which will carry out the assessment of the privileged nature of the document. To ensure that the Commission will not investigate the document in when waiting for the decision of the General Court, the company may apply for interim relief until the General Court delivers its decision.³³¹

The ECtHR has not put forward strict requirements concerning the handling of LPP documents, insofar as their content is not revealed to the authority. Thereby, removing the documents from the premises of an undertaking is not problematic from the perspective of the ECHR. Moreover, the fact that the final decision concerning the nature of the documents is delivered by the General Court further ensures that the procedure is in compliance with the ECHR. However, as established above, it is not sure if the definition of LPP is corresponding, whereby the procedure may not protect all documents that would fall in the category of LPP pursuant to ECtHR definition. The procedure protects only documents related to the investigation at hand. The ECtHR has not specified exactly what kind of communication is protected under LPP and could this definition be broader than that of EU

³³⁰ C-550/07, *Akzo Nobel Chemicals and Akros Chemicals v Commission*, EU:C:2010:512, paras 79–88.

³³¹ *Ibid*, paras 79–88.

law – meaning that also legal advice not related to the case under investigation or issued by other lawyers than those member to the bar of a Member State could be protected by LPP.

4.4 Safeguards in Finland

4.4.1 Judicial review in 2017: subject to proposal for penalty payment

In Finland, competition authority inspections of business premises are not subject to prior judicial authorization. Moreover, the right to appeal an inspection decision or the measures taken during an inspection has been limited only to those cases which lead to proceedings at the Market Court. Pursuant to Section 44 of Competition Act, a decision to conduct an inspection in business premises may not be appealed. The prohibition against appeal was introduced by the Act 303/1998 amending the Act on Competition Restrictions.³³² At the time, the decision to conduct an inspection was considered as a preparatory act to the competition investigation and thereby, according to general principles of administrative law, not subject to appeal.³³³ However, today this classification seems rather odd when compared to other situations, where the right to appeal has been limited. Pursuant to the general principles of Finnish administrative law, the prohibition against appeal applies, *inter alia*, to decisions that have an impact only within the administration or that are of general nature, preparatory or related to technical execution³³⁴. At the outset, decisions concerning details of technical execution and a decision to carry out a full-scale dawn raid do not appear to be comparable. Due to limitations of space, I will not address the administrative law classification in more detail.

The very wording of Section 44 of the Competition Act states that the inspection decision may not be appealed, but in practice this is possible in the proceedings at the Market Court³³⁵. Any suspected irregularities in the inspection decision or in the inspection procedure may be addressed in the proceedings concerning the principal claim – that is, if the FCCA makes the proposal for a penalty payment to the Market Court. The FCCA makes approximately one proposal per year³³⁶, but it carries out inspections in approximately five matters per year,

³³² HE 243/1997, p.35.

³³³ HE 243/1997, p.35; Petäjäniemi-Björklund 2008, p. 460.

³³⁴ Mäenpää 2006, para 324.

³³⁵ Statement of the Supreme Administrative Court 18 May 2017 on the reform of Competition Act, p. 5.

³³⁶ See the case register at www.kkv.fi/ratkaisut-ja-julkaisut/kilpailuasiat/esitykset-markkinaoikeudelle.

and the number of inspected premises varies between 15–21³³⁷. The FCCA does not provide the information of how many individual undertakings are subjected to inspections yearly³³⁸.

In the event the FCCA does not make a proposal for a penalty payment, the companies under inspection do not have access to judicial review. The Working Group Report states that legality control is carried in the context of main proceedings and that companies subjected to inspection may file an administrative complaint³³⁹, which is provided by the Administrative Act. This, however, does not amount to judicial review. Pursuant to Section 53a of Administrative Act, any person may file a complaint concerning the legality of a measure taken by an authority or the failure of an authority to fulfill their responsibilities. Moreover, other similar irregularities may be addressed in a complaint³⁴⁰. In practice, this means that the complaint always concerns the measures taken or omissions of the authorities, and not *per se* the decision, upon which these measures may be based on³⁴¹. Measures of an individual officer may be addressed in a complaint made to the FCCA. In questions concerning the FCCA as an authority, the competent authority are the supreme guardians of law³⁴², that is the Chancellor of Justice³⁴³ or the Ombudsman³⁴⁴.

The administrative complaint does not lead to an alteration or reversal of a decision, because supreme guardians of law do not have the competence to do this. What they may do is give to the authority an opinion or notice of the correct application of law.³⁴⁵ Moreover, the supreme guardians of law do not have the competence to order restitution. Where the measure or omission is “particularly reprehensible”, the supreme guardians of law may file a criminal law suit or require damages.³⁴⁶ The threshold to these measures is high, as they require the authority to carry out a suspected criminal act or cause identifiable pecuniary damage to the company. Petäjaniemi-Björklund points out that the authorities handling the

³³⁷ Working Group Report, p. 14. This does not specify what number of the inspections are related to suspected anticompetitive agreements and abuse of dominance and what, if any, to mergers and acquisitions.

³³⁸ Email response of Rainer Lindberg, Deputy to the Head of Department of the FCCA, of 26 June 2017.

³³⁹ Working Group Report, p. 15.

³⁴⁰ Mäenpää 2016, s. 112.

³⁴¹ Prosessityöryhmän välimietintö 2009:19: Hallintolainkäytön kehittäminen, p. 121.

³⁴² In the event the complaint concerns individual civil servant, the complaint may be filed with the superior of the individual in question.

³⁴³ See, for example, Decision of the Deputy Chancellor of Justice of 30 December 2010: Päätöksenteon viipyminen Kilpailuvirastossa.

³⁴⁴ See, for example, Decision the Deputy Ombudsman Of 18 December 2013: Asian käsittelyn viivästyminen Kilpailu- ja kuluttajavirastossa.

³⁴⁵ Section 53 c of the Administrative Act; Mäenpää 2016, p. 114; Mäenpää 2005, p.9

³⁴⁶ Section 53 c of the Administrative Act; Mäenpää 2016, p. 114.

complaint have a very wide margin of appreciation, as the procedure is complementary to normal remedies. This is underlined by the fact that an administrative complaint may be filed by any individual and not exclusively by a party whose rights and duties are at play.³⁴⁷

The Government Proposal on the reform of Administrative Act explicitly states that the administrative complaint is not a legal remedy, and it does not aim to alter or overrule an authority decision³⁴⁸. Moreover, the administrative complaint is described as a general supervisory mechanism of administration, which may be activated by everyone³⁴⁹. The administrative complaint is complementary to the normal appeals procedure, and it is relevant particularly in the cases where there is no access to ordinary remedies³⁵⁰. This entails the provision public services, and authority measures that do not have an impact on the rights and duties of individuals or legal persons, undertaken in for example in education, police action and the production of social and health services³⁵¹. Again, an announced competition authority inspection does not appear to be comparable to the measures listed in the government proposal. The ECtHR, for its part, has classified the administrative complaint as not a legal remedy³⁵². The decision on the appealed matter is not subject to appeal³⁵³, as it is not considered to affect the rights and duties of the complainer³⁵⁴.

The preparatory works and legal literature highlight the supervisory role of an administrative complaint. It is repeatedly stated that it is best suited for situations where the rights and duties of individuals or legal persons are not at play. Thereby, it can hardly be constructed as a remedy in situations where the right to privacy is interfered with. Nevertheless, this is the only review mechanism available for companies who have been subjected to authority inspections in the case the FCCA does not make a proposal to the Market Court.

As established above, the ECtHR has interpreted Article 8(2) ECHR as requiring prior judicial authorization, an inspection decision subject to appeal or *a posteriori* judicial review

³⁴⁷ Petäjäniemi-Björklund 2008, p. 432. This was at the time when administrative complaint was not included in the Administrative Act. However, the procedure was available and the competences of the authorities handling the complaints were equivalent.

³⁴⁸ HE 50/2013: Hallituksen esitys eduskunnalle laiksi hallintolain muuttamisesta, p 4; *see also* Helminen, Fredman, Kanerva, Tolvanen and Viitanen 2014, p.793.

³⁴⁹ HE 50/2013, p 4; *see also* Prosessityöryhmän mietintö 4/2011: Olkeudenkäynti hallintoasioissa, p.77; Mäenpää 2005, p. 144.

³⁵⁰ HE 50/2013, p 4. In Finnish, the term is säännönmukaiset muutoksenhakukeinot.

³⁵¹ *Ibid*, p 4.

³⁵² *Janatuinen v. Finland*, Application no. 4692/04, 8 December 2009 (admissibility). The decision was issued four years prior to the government proposal in question.

³⁵³ Section 53 d of the Administrative Act.

³⁵⁴ HE 50/2013, p 4.

of authority actions, where there is an interfere with the right to privacy. As established above, administrative appeal does amount to such review. Judicial review is limited only to the cases where the inspection leads to proceedings at the Market Court. Thereby, the Finnish legislation in force does not provide judicial review in the extent required by the ECtHR. The availability of a review is dependent upon the authority initiating a trial.

It is also noteworthy that where the inspection leads to a trial at the Market Court, the delay between the inspection and the the proceedings is normally two years or more³⁵⁵. This seems to be in conflict with the requirement of timely review. It is possible that a judicial review is not effective, where the waiting period is excessively long. As established above, this was the case in *Modestou* – in the context of a natural person.

4.4.2 Judicial review in the courts: focus on the legal basis

The Market Court and the Supreme Administrative Court have applied Article 8 ECHR in one case, *Asfalttiliitto and others*³⁵⁶. Other judgements of the courts do not address the right to privacy set out in Article 8 ECHR. The companies have not challenged the inspection decision or any measures taken by the authorities in the proceedings at the Market Court³⁵⁷. At the outset, there are two potential reasons for this. Firstly, the companies under inspection consider the authority measures to be legitimate, whereby there is no need to appeal. Secondly, it is possible that where the trial concerns fines that may amount to millions of euros³⁵⁸, the companies focus on other aspects of the case. The right to privacy becomes a secondary interest. Pursuant to the Statement of the Market Court to the Working Group Report, the absence of claims does not mean that there would not be need for legal remedies³⁵⁹.

³⁵⁵ In Linja-autoliitto, Matkahuolto ja linja-autoyhtiöt, the competition authority carried out inspections between August 2011 and October 2011. The proposal for a sanction was made approximately four and half years later in January 2016. In Eltel the period was shorter, as the inspections were initiated in February 2013 and the proposal made in October 2014, after year and a half. In Valio the inspections were carried out in January 2011 and March 2012, and the proposal was made in December 2012, almost two years after the first inspection. In Iittala, the inspections were made in October 2006 and October 2007, and the proposal was made in April 2010. Here, the delay was over three years from the initial inspection. In HL Group, Kaha, Koivunen ja Örum, the competition authority carried out the inspection regarding Kaha in July 2004 and the proposal was made in July 2006, again some two years later. In the case Metsäliitto osuuskunta ja Stora Enso, the dawn raids were carried out in May 2004 and the proposal was made in December 2006, that is two and half years after the inspection.

³⁵⁶ *Asfalttiliitto ja muut (MAO)*

³⁵⁷ Statement of the Market Court 15 May 2017 on the reform of Competition Act, p. 2.

³⁵⁸ The latest penalty payment proposal of the FCCA amounted to 38 million euros. See Kilpailuviraston määräys ja seuraamusmaksuesitys 25.1.2016 (Linja-autoliitto ja muut), p. 81–96.

³⁵⁹ Statement of the Market Court 15 May 2017 on the reform of Competition Act, p. 2.

In the case of *Asfalttiliitto and others*³⁶⁰ one of the applicants claimed the inspection of their business premises was carried out in a way that violated their right to respect for privacy under Article 8 ECHR. They based their claim on *Société Colas*, where the inspection was deemed disproportionate, as the authority seized a vast number of documents without a prior judicial warrant and in the absence of the representatives of the company. The inspection at the business premises of the Finnish applicant was authorized by the FCCA³⁶¹ and carried out without police supervision. During the inspection, the FCCA inspected the calendars of the management of the company as well as personal items of the employees to ensure that they are of personal nature. This happened in the absence of the relevant employees. The applicant requested that the inspection materials obtained in breach of Article 8 ECHR should not be used as evidence.³⁶²

The argument was rejected both by the Market Court and the Supreme Administrative Court. The Market Court considered that firstly, the inspections had a legal basis in the Act on Competition Restrictions and second, the legislation in force at the time of inspection set sufficient limitations to the inspection powers of the authorities. Section 20 Act on Competition Restrictions authorized the FCCA to carry out an inspection to supervise the compliance with the provisions of the act, as well as the regulations and orders based on the act. Furthermore, Section 20 Act on Competition Restrictions provided the FCCA the right to gain access to business and warehouse premises, land and vehicles. Moreover, the authority had the power to inspect the correspondence, the books, data recordings and other documents that might be relevant in the supervision of compliance with the Act on Competition Restrictions and regulations and orders based on the act. Lastly, the FCCA had the right to require oral explanations at the spot as well as take copies of the inspected documents.³⁶³

In its reasoning, the Market Court put weight on the legal basis of the inspection. Furthermore, it considered that there were sufficient differences between the case at hand and that of *Société Colas*. It did not specify on the issue. The Market Court concluded that even in the absence of prior judicial warrant and the absence of police supervision, the

³⁶⁰ *Asfalttiliitto ja muut (MAO)*

³⁶¹ At the time of the inspection and the court proceedings, the FCCA was officially the Finnish Competition Authority. For the sake of coherence, the Finnish Competition Authority will be also addressed under the current name. The name was changed when the Finnish Competition Authority and the Finnish Consumer Authority were joined in 2013.

³⁶² The reply of Valtatie Oy in *Asfalttiliitto ja muut (MAO)*.

³⁶³ The statement of reasons of the Market Court in *Asfalttiliitto ja muut (MAO)*.

inspection was not carried out in breach of Article 8 ECHR or any provisions of the Act on Competition Restrictions.

The Supreme Administrative Court considered, similarly, that the legislation set sufficient limitations to the discretion of the authority. The court pointed out that the ECtHR has not established a prior judicial warrant as a prerequisite for an inspection, but that the ECtHR has deemed that a sufficiently precise legislation and the existence of adequate legal safeguards balance out the absence of a warrant. The Supreme Administrative Court further highlighted that the French competition legislation at the time provided the authority with an extremely wide margin of appreciation regarding the necessity, number and duration of the inspections.³⁶⁴ The court stated that the Act on Competition Restrictions, to the contrary, sets out in a precise way the areas in which the authority may carry out inspections as well as the materials it has the power to inspect. Furthermore, the court pointed out that the company under inspection had the right to legal review at two instances (*i.e.* the Market Court and the Supreme Administrative Court).³⁶⁵

The judgements of the Market Court and the Supreme Administrative Court have features that have been condemned in later case-law of the ECtHR. The focus is on the legal basis of the inspections and the clarity of the legislation. The courts do not address the measures taken during an inspection. However, the in *Asfalttiliitto and others*, the applicant referred to *Société Colas* where the central issue was the existence of a prior judicial warrant. Thereby, as the applicants contested the legitimacy of the inspection in the absence of a judicial warrant and did not raise the need for an effective judicial review.

4.4.3 Judicial review to be: subject to proposal for penalty payment

The Working Group of the Competition Act reform does not propose reform of the appeals system. It did identify the following alternatives to the current situation: a prior authorization by the competent court, the right to appeal the inspection decision or the inspection procedure, or a combination of the two.³⁶⁶ Pursuant to the representatives of the national courts, the court granting the permission has only very limited means to set boundaries to the inspection beforehand. The representatives consider that any potential irregularities will be best assessed in the main proceedings. The representatives of the Finnish Bar Association

³⁶⁴ *Asfalttiliitto ja muut (KHO)*, para 1007.

³⁶⁵ *Ibid*, para 1008.

³⁶⁶ Working Group Report p. 14–15.

and of industry organisations, for their part, consider it necessary to subject the inspection decision to appeal.³⁶⁷ The Working Group recommended to leave the situation at it is.

The Working Group consulted professor of constitutional law Tuomas Ojanen on the topic. Ojanen commented both the inspections of business premises and those of domestic premises. Pursuant to Ojanen, the fact that the CLC did not address the prohibition against appeal upon the preparatory stage of the Competition Act entails, at the outset, that this is in compliance with the Finnish Constitution.³⁶⁸ Ojanen also highlights that the judgements of the ECtHR should be read in the light of the facts of each case. He also puts forward the argument that the ECtHR has not required judicial review in all cases. As a conclusion, Ojanen states that court supervision may, however, be necessary at some point, but that the ECtHR does not provide a clear answer to this.³⁶⁹

From the perspective of the ECtHR judgements concerning Article 8 ECHR, Ojanen's conclusion appears to conflict the position of the ECtHR. From the perspective of other ECHR rights³⁷⁰, judicial review may not be an absolute requirement, but the ECtHR has indeed interpreted Article 8 ECHR as requiring judicial review of the interference – in advance or in retrospect – in all cases. This is the interpretation the ECtHR has put forward repeatedly and without exceptions. Furthermore, the reference to the compliance with the Constitution is not relevant for companies under inspection. As established above, the Constitution does not protect the rights of companies when it comes to the right to privacy. Furthermore, the CLC has not referred to Article 8 ECHR when assessing the legitimacy of the prohibition against appeal. Thereby, the statements of the CLC on this matter may not take into account Article 8 ECHR and the relevant developments of case-law.

Judicial authorization or review, for their part, are a requirement put forward to ensure that interferences with the right to privacy do not amount to violations thereof. It is possible that in Finland, companies right to privacy is not constructed as a real human right subject to protection under all circumstances. This approach is highlighted by the statement of the Ministry of Justice on the Working Group Report. In the statement, the Ministry of Justice stipulates that in the absence of a proposal for a penalty payment, a company subjected to

³⁶⁷ *Ibid*, p. 32.

³⁶⁸ *Ibid*, p. 32.

³⁶⁹ *Ibid*, p.33.

³⁷⁰ Nagy 2016, p. 235.

inspection does not have a significant need for legal remedies³⁷¹. In Finland, an inspection is not viewed as an interference with a protected sphere – or if so, it is meaningful only if it leads to further consequences.

In this regard, Finland has chosen a path different from the EU, too. It is true that the Commission has more extensive powers than the FCCA at the different stages of the investigation. The possibility to appeal the inspection decision may, in this regard, be justified by the Commission power to take final decision of fines imposed. However, also the FCCA has certain decision-making powers, as it takes decisions regarding the competition infringements. It also prepares the proposition for a penalty payment. In doing so, it may employ materials obtained in unannounced inspections. Thereby, the powers of FCCA are not insignificant. Moreover, as the Commission procedure falls short from the ECtHR standard, it is difficult to argue why the Finnish standard of safeguards should be lower.

If Finland would introduce to all companies not only the possibility to appeal an inspection decision but also the measures taken during the inspection the protection would, on the contrary, be more extensive than in the EU. A Commission inspection in Finland could lead to the potential scenario where the measures of the Finnish authorities assisting the Commission agents would be subject to judicial review in Finland but the measures of the Commission authorities are, pursuant to EU legislation, only subject to appeal in the context of the final decision. Pursuant to EU law, national courts are not competent to assess the legality of Commission measures but that assessment may be only carried out by the CJEU. As stated above, the contracting parties to the ECHR do have the obligation to ensure that the ECHR is respected in their jurisdiction. Thereby, the compliance with EU law in this scenario would lead to a breach of an obligation under ECHR – or vice versa. Technically, this is already the case as the case-law of the ECtHR does put forward the requirement of a judicial authorization or judicial review. Such conflicting situations could be avoided where also the EU would adopt the standard of the ECtHR.

4.4.4 LPP protection: in the hands of authority

When it comes to the documents protected under LPP, the procedure in Finland differs from the EU procedure. Pursuant to Section 38(3) Competition Act, undertakings are not obliged to hand to the FCCA correspondence between an external lawyer and the client company.

³⁷¹ Statement of the Ministry of Justice 16 June 2017 on reform of Competition Law, p. 9.

However, there are no provisions governing the procedure to establish the privileged nature of the documents. Where the FCCA and the undertaking do not agree on the nature of the document, it is for the FCCA to make the decision. The FCCA copies the controversial document and assigns it to an officer who is not involved in “the material handling of the matter” and does not participate in the decision-making process concerning the matter. The officer is entitled to take a cursory look of the document to assess if it fulfills the criteria of LPP. Where the officer considers the document protected by LPP, the document is returned to the company in question. Where not, the document is subjected to inspection.³⁷² This decision is not subject to appeal as such but it may be appealed to the Market Court in the context of the proposition of a penalty payment.

The Working Group has suggested that this procedure would be enshrined in the Competition Act with minor adjustments. The procedure would entail that the review is carried out by an officer of the FCCA whose tasks do not include competition matters.³⁷³ The access to judicial review would remain the same, whereby the decision taken is not subject to appeal³⁷⁴.

Pursuant to the members of the Market Court heard at the Working Group, the limitation is justified as in the absence of a proposal for a penalty payment, the undertaking in question has no need for legal remedies. In this case, the document protected by LPP is not used against the company³⁷⁵. Similarly, Råman has stated that in a competition authority inspection, the need for procedural safeguards and legal remedies is more limited than in seizures carried out in criminal law procedures. In these cases, the independent judicial supervision is necessary in his view.³⁷⁶ This interpretation is in line with the judgement of *AM&S*, where legal professional privilege was limited only to documents related to the issue under investigation. In this way, LPP is constructed mainly or exclusively as a part of rights of defence. Pursuant to the ECtHR, LPP is tied to the right to privacy at a more general level whereby the need judicial review is not tied to the documents being used in a later trial.

As established above, the case-law of the ECtHR puts forward the requirement of judicial review of controversial documents but it does not establish that an initial assessment could

³⁷² Working Group Report, p. 36.

³⁷³ *Ibid*, p. 37.

³⁷⁴ Ministry of Justice states that based on Working Group Report, it is unclear if this decision may be subject to appeal, Statement of the Ministry of Justice 16 June 2017 on reform of Competition Law, p. 6.

³⁷⁵ Statement of the Market Court 15 May 2017 on reform of Competition Law, p. 3.

³⁷⁶ Råman 2008, p. 203.

not be made by the authority. What is decisive is the possibility of a timely judicial review where LPP documents are suspected to be seized or copied. The ECtHR has not considered problematic the seizure of such materials, insofar they will be returned to the undertaking or destroyed once the LPP nature of the documents is established. This leaves open the possibility for the authority to carry out the initial assessment. Thereby, the Finnish procedure would be in line with the ECtHR interpretation – but only where the decision made by the authority could be subjected to a timely judicial review. In legal literature, De Jong and Weisseling consider the assessment carried out by a competition official a sufficient safeguard for LPP³⁷⁷ - insofar as it is complemented with the right to appeal³⁷⁸. Where the inspected company would agree with the assessment, there would be no need to judicial review.

When it comes to the differences between Finnish and EU procedure, those may again be justified by the different competences of the competition authority. The Commission has the competence to make the final decision on the matter, whereby the privileged material might, when exposed, have an influence on the final decision. In Finland, this decision-making role is reserved for the Market Court. However, there are also risks in Finland, as the information contained in the LPP documents may still influence the investigation and even contribute to the proposition made to the Market Court. The separation of powers does not prevent the abuse of information protected by LPP. Thereby, only the possibility to have the nature of the document reviewed by an independent body where the authority and the company do not agree on the LPP classification would ensure the full protection of LPP documents. This is also the procedure required by the ECHR. Moreover, Savola has proposed that a discrepancy between the level of protection in Finland and the EU is problematic from the perspective of justice policy³⁷⁹ - but that is not tied to the right to privacy, *per se*.

5. Conclusions

Pursuant to the case-law of the ECtHR, all interferences with the right to privacy as provided by Article 8 ECHR must be subject to judicial authorization or *a posteriori* judicial review. An unannounced competition authority inspection at company premises is by its nature an interference with Article 8 ECHR. Similarly, the seizure, the copying or the inspection of documents protected by LPP is an interference with this right.

³⁷⁷ De Jong and Weissleing 2016, p. 332.

³⁷⁸ *Ibid*, 334.

³⁷⁹ Savola 2006, p. 868.

The interference with the right to respect to home, within the meaning of business premises, takes place when the authorities initiate inspection at the premises. Pursuant to the case-law, a company should be able to subject both the inspection decision and the measures taken during the inspection to judicial review. The interference with the right to respect to correspondence, for its part, takes place when documents protected by LPP are handled by the authority. The ECtHR has stated that the company should be able to either to prevent the seizure or copying of such documents or alternatively have the possibility to have them returned or destroyed. Furthermore, it has stated that where there is a suspicion that documents under inspection include material protected by LPP, the reviewing judicial authority should assess the nature of these documents. However, it has not explicitly stated that all controversial documents should be subjected to judicial review at first instance to establish, if they contain LPP information. This leaves open the possibility to have the nature of controversial documents assessed in an alternative procedure. Nevertheless, judicial review should be available as a final safeguard, as this is the requirement for all interferences with Article 8 ECHR. Moreover, the ECtHR has not provided an exhaustive definition of LPP in the context of companies' right to privacy. It is possible that the definition of LPP covers also legal advice not related to litigation, whereby the definition would be broader than in the EU and in Finland, and trigger the safeguards also where such documents are handled.

In the EU, the right to privacy is protected under Article 7 CFR and general principle of EU law. Article 7 CFR does, in principle, correspond to Article 8 ECHR. Moreover, Article 52(3) CFR leaves open the possibility to provide more extensive protection. In this way, the ECHR provides protection within the EU even if the EU is not a contracting party. In practice, the question is more complex. The case-law of the ECtHR has an ambivalent role, as the standards set by the ECtHR are not directly adopted by the EU. The CJEU applies the standards in its own way, in the context of EU law. This was evident in *Deutsche Bahn*, where the CJEU referred to the case-law of the ECtHR but in its final assessment, focused on very different points than would have been the case in the ECtHR.

The CJEU has not provided an exhaustive interpretation of the relationship between Articles 7 CFR and 8 ECHR from the perspective of companies under competition authority inspections. It remains unclear how, and to what extent, the judgments of the ECtHR contribute to the definition of the EU fundamental right, and if the EU aspires to provide also similar safeguards to ensure that the right is respected. As for now, the possibility to

subject the inspection measures to judicial review only when appealing the final decision of the Commission does not appear to be in line with the ECtHR standard. Thereby, irrespective of the references to the ECHR, the protection of the right to privacy in the EU does not correspond to the standard set out by the ECtHR. However, the EU does not have a legal obligation to meet that standard. It is not a contracting party to the ECHR nor does it bind itself to the judgements of ECtHR by the provisions of EU law.

In Finland, the role of the ECHR and the judgements of the ECtHR is, at the outset, less complex. Finland as a state actor is bound by the ECHR and any relevant interpretations put forward by the ECtHR. Nevertheless, companies right to privacy under competition authority inspections does not seem to be interpreted fully in the same way. This may have to do with the relative novelty of the right – or the way the rights of companies are viewed. Bottomley has proposed that the discussion on human rights of companies suffers from a cognitive bias: people expect companies to do bad things. In this view, rules should be in place to protect people from companies and not to protect companies from state actors.³⁸⁰ Similarly, the actual harm caused by an authority inspection may be hard to construct. The Commission and the FCCA both investigate suspected infringements and in doing so, inspect business documents – which they just copy and not even seize. Put this way, an inspection is not dramatic interference. However, it still entails an entry into company premises and databases, as well as requires the company to take measures after the inspection to review the inspected materials itself. Andersson and Legnerfalt argue, in the context of Commission inspections, that an inspection amounts to a serious invasion of the integrity of the companies. The inspection also has repercussions in the company, as the companies normally must start an internal investigation on the matter and carry out compliance checks.³⁸¹ Thereby, even if an inspection is a justified way to investigate suspected infringements, it still operates in a protected sphere and is a burden to the company in question. This is even more relevant, as all companies subjected to inspections are not found guilty of competition infringements.

It cannot be ignored that the right to prior or *a posteriori* judicial review could be misused. Any company willing to hinder an investigation could certainly benefit from appeals procedure. Appeals could also be recommended by external company lawyers, who would have the financial incentive to do so. This would put an additional burden on the competition

³⁸⁰ Bottomley 2002, p. 64–65.

³⁸¹ Andersson and Legnerfalt 2008, p. 444.

authority and its resources, as well as cause additional work to the national courts. It is well known that public authorities do not, to put it simply, have extra time or money. However, that same argument could be turned around. If the resources are not sufficient to being with, the risk of human errors grow – and at the same time, the need for protection of the rights of undertakings who may be subjected to interfering measures. From the perspective of ECHR, resource questions have not amounted to a credible defence.

In the EU, the CJEU handles the appeals of inspection decisions as well as carries out the assessment of the nature of documents that are suspected to contain information protected by LPP. Only the right to appeal the inspection measures is limited. The reason for this may be the internal logic of appeals procedure: the aim of appeals procedure is the avoidance of illegal decisions. The inspection measures are subjected to judicial review only to the extent they may have an impact on the final decision. The second possible explanation is that the CJEU simply is not a human rights court. Its purpose is not to investigate potential violations of fundamental rights but to ensure that the actions of the Commission are legitimate.

Curiously enough, the EU is still closer to the ECHR standard than Finland, a contracting party of 27 years. The possibility to appeal inspection decisions and the possibility to subject suspected LPP documents to court assessment partially fulfil the requirements put forward by the ECtHR. Finland, for its part, subjects these questions to judicial review only if the investigation leads to proceedings at the Market Court. A potential reason for this may be in the traditions of fundamental rights protection. Lavapuro points out that fundamental rights are supervised differently in different legal systems³⁸². Some have chosen to carry out the assessment upon drafting new legislation whereas others entrust courts with this role – and those two ways do not easily mix³⁸³. Finland has chosen to carry out the assessment at the preparatory stage, where the CLC plays a decisive role. Thereby, the legislation in force should, in principle, be in compliance with the human rights obligations and where authorities act within their competences, the rights be respected. Mäenpää reminds that upon accession to the ECHR, there were fears of transition of powers from the CLC to courts³⁸⁴ - and there may still be reluctance to extend court supervision on the basis of human rights obligations. The EU, on the contrary, has chosen the latter way. The CJEU has the

³⁸² Lavapuro 2010, p. 225-226.

³⁸³ *Ibid*, p. 225-226.

³⁸⁴ Pellonpää 2005, p. 56.

competence to assess the validity of EU legislation, and it has also played an active role in developing fundamental rights protection in the EU.

By not becoming a contracting party to the ECHR, the EU has maintained the possibility to be more flexible with the judgements of the ECtHR. The CJEU may draw inspiration from them, but it may also reach different conclusions. This happened in *Deutsche Bahn*: the CJEU referred to ECtHR case-law, after which it settled to assess if irregularities taking place during an inspection rendered following inspection decisions illegal. In doing so, it did not fully assess if the measures taken during the inspection were a violation of right to privacy nor did it find problematic that this question could be answered only in the context of an appeal of the potential final decision. Thereby, CJEU continues to draw inspiration from the ECHR and the judgements of the ECtHR, but it is not willing to review, for example, the existing appeals procedure on that basis. Thereby the appeals procedure for competition inspections established in the case-law of the CJEU remains intact, even where the ECtHR interpretations develops further.

The EU does not have a legal obligation to comply with the ECtHR judgements. Finland, for its part, is bound by the ECHR and for that matter, required to follow developments in the case-law of the ECtHR. As for now, it seems very clear that Article 8 ECHR does put forward the requirement to allow companies to subject both the inspection decision and the measures taken during the inspection to judicial review either before the inspection or afterwards. All companies subjected to inspections should be granted this possibility under Article 8 ECHR. Where this possibility is limited only to a potential later trial, to which only a small number of inspections leads to, Article 8 ECHR is not fully respected. Furthermore, even in those cases, the long waiting period between the inspection and the review may not be sustainable under Article 8 ECHR.

The Working Group Report suggests that the requirement of judicial authorization or judicial review is not taken fully into account upon the Competition Act reform. The situation may, however, be different upon the final Government Proposal. As for now, it seems that the right to privacy as provided by Article 8 ECHR is not fully respected as a right of its own and a right that requires sufficient safeguards. My study has identified following potential reasons for this. Firstly, the CLC focuses on interpreting Section 10 FC and thereby, only addresses the rights of natural persons. The CLC has not assessed if the rights of companies under Article 8 ECHR are respected. Nevertheless, the statements of the CLC are used as a

source when drafting new legislation and in doing so, this feature of the statements is not acknowledged, at least not openly. Secondly, judicial review required under Article 8 ECHR is confused with the right to fair trial required by Article 6 ECHR. These articles address different situations. Article 8 ECHR is triggered upon interference with the right to privacy, whereas Article 6 ECHR is relevant in court proceedings. Finally, it is also possible that right to privacy is considered as a right of lesser importance. The drafters may weigh the additional burden caused to authorities against the value of companies' right to privacy to the detriment of the latter. An appeal to the ECtHR of an inspection case would bring clarity to the situation. It is likely that the ECtHR would, also in that case, put forward the requirement of judicial review – or reverse this well-established rule.